Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

UNITED AIRLINES, INC. AND UAL CORPORATION,
Petitioners,

v.

KATSUKO HOSAKA, INDIVIDUALLY AND ON BEHALF OF THE ESTATE AND HEIRS OF SADAO HOSAKA, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In the case of international transportation of persons performed by aircraft for hire, any action seeking to recover damages for bodily injuries suffered as a result of an accident on board an aircraft, or in the course of any of the operations of embarking or disembarking, are governed exclusively by the Warsaw Convention. The question presented in this case is:

Whether the doctrine of *forum non conveniens* is a procedural tool which is prohibited in cases governed by the Warsaw Convention?

PARTIES TO THE PROCEEDING

Petitioners

Petitioners are United Airlines, Inc. and UAL Corporation. UAL Corporation is a publicly traded company and is a holding company whose principal subsidiary is United Airlines, Inc. There are no publicly held companies which own ten percent or more of petitioners' stock.

United Airlines, Inc. and UAL Corporation were the defendants in the District Court and Appellees in the Ninth Circuit Court of Appeals.

Respondents

The following persons are individual citizens of Japan who are also believed to reside in Japan. They are not known to have any corporate affiliations. These individuals were the plaintiffs in related cases in the District Court and Appellants in the consolidated appeals before the Ninth Circuit Court of Appeals:

Kaisuko Hosaka, individually and on behalf of the Estate and Heirs of Sadao Hosaka, Keiko Hirase, Shuichi Inako, Hisako Inako, Osamu Inako and Hiroshi Inako, a minor, by and through his guardian ad litem, Shuichi Inako, Kaori Ito, Takamasa Kataura, Machie Taira, Masaki Konuma, Shuichito Minami, Yuriko Minami and minors, Takahiro Minami and Tomohiro Minami, by and through their guardian ad litem Shuichiro Minami, Nobuaki Mizuno, Takako Mizuno, Takashi Onishi, Junko Onishi, Masaya Onishi and Mihiko Onishi, Nubuo Shiga, Kimee Shiga, Nobuyuki Tanaka, Kinuyo Tanaka, Yukiko Tanaka and Makiko Tanaka, Koji Teshima, Kumiko Teshima, Izumi Tosaka, Takeo

Yoshikawa, Kimiko Yoshikawa, Yae Yoshikawa, Ayako Yoshikawa, Yuki Yoshikawa, Miyoko Nakazato, Takehito Yoshikawa, Nami Yoshikawa, a minor and Chizuru Yoshikawa, a minor by and through their guardian ad litem Takehito Yoshikawa, Kozo Yamada, Isa Yamada, Msahiko Yamada and Chizuru Yamada.

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Petitioners respectfully petition for a Writ of Certiorari to review the judgment of the Ninth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Ninth Circuit opinion (App. A at 1a-32a) is reported at 305 F.3d 989 (9th Cir. 2002). The District Court order filed December 19, 2000 is unreported. (App. B at 33a-48a). The District Court order filed January 7, 2000 is also unreported. (App. C at 49a-69a).

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on September 18, 2002. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

TREATY PROVISIONS INVOLVED

This case involves the following treaty provisions:

Article 28 of the Warsaw Convention (formally known as the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, 3014,T.S. No. 876 (1934), note following 49 U.S.C. § 40105).

Article 28(1) of the Warsaw Convention establishes the four national fora in which an injured party may initially bring suit for damages against an international air carrier for death or injury: "An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he

has a place of business through which the contract has been made, or before the court at the place of destination."

Article 28(2) of the Warsaw Convention provides that "Questions of procedure shall be governed by the law of the court to which the case is submitted."

STATEMENT OF THE CASE

The plaintiffs were passengers aboard a United Airlines flight from Tokyo to Honolulu on December 28, 1997. Approximately 90 minutes into the flight, the aircraft unexpectedly encountered two episodes of severe clear air turbulence and some of the passengers, particularly those not using seat belts, claimed injuries as a result. One such passenger sustained fatal injuries.

Through 18 separate filings, the 46 plaintiffs instituted litigation in the United States District Court for the Northern District of California. They selected this forum even though apart from having a lawyer practicing in that District, there was no nexus of any kind between the District and the plaintiffs, their alleged injuries, their claimed treatment or their purported losses. Every plaintiff in every case lives in Japan, works in Japan, is a citizen of Japan, received medical care (if at all) in Japan and otherwise sustained whatever damages he or she sustained, in Japan. All records relating to their alleged accident-related injuries and damages are in Japanese and located in Japan.

Because these lawsuits involve injuries allegedly sustained by plaintiffs in the course of international transportation by air, the governing principles are those set forth in the Warsaw Convention, as modified by certain contractual undertakings, as well as tariffs filed with the

United States Department of Transportation. (See, e.g., App. B at 36a). The particular contractual undertakings of relevance are the IATA Intercarrier Agreement and the Agreement on Measures to Implement the IATA Intercarrier Agreement. (*Id.*) Because the Warsaw Convention, as modified by the contractual agreements, provides, *inter alia,* for presumed liability (*Insurance Co. of North America v. Federal Express Corp.,* 189 F.3d 914, 917 (9th Cir. 1999)), the only evidence which would be proffered by the plaintiffs in these cases would be that which related to each plaintiff's individual *damages* – all of which is in Japan, in the Japanese language.

In view of the nature of the relevant evidence, and its remoteness from the forum selected by the plaintiffs, United moved to dismiss the cases on grounds of *forum non conveniens*. In two separate orders which together embraced all of the related lawsuits, the District Court conditionally granted United's motions to dismiss. (See App. B and App. C). In so doing, the District Court faithfully and fairly applied the factors set out by this Court in *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947) and its progeny. The District Court's ultimate conclusion was that "[o]verall, the balance of private interest factors central to the Court's inquiry . . . clearly weigh in favor of Japan as the forum for this suit." (App. C at 65a-66a). "[T]he Court [found] that the public interest factors favor Japan as the proper forum" as well. (App. B at 45a).

Plaintiffs appealed to the Ninth Circuit and their appeals were consolidated. (305 F.3d at 993 n.2). Plaintiffs contended, *inter alia,* that the District Court abused its discretion in entertaining United's *forum non conveniens* dismissal motions because, in their view, that well-established procedural doctrine was not available to airline defendants in

cases governed by the Warsaw Convention. All apposite legal authority in this country was to the contrary and *forum non conveniens* dismissal motions had been entertained repeatedly by state and federal courts in cases governed by the treaty.

While acknowledging (but eschewing) the authority in this country which was directly contrary,[1] the Court of Appeals below instead embraced the result reached (but not the reasoning employed) by a single Court of Appeal in England in a lost cargo case, *Milor S.R.L. v. British Airways PLC*, [1996] Q.B. 702 (1996). It was the view of the lead author of that opinion that: "The procedural power to stay on the ground of forum non conveniens is, in my judgment, inconsistent with the right conferred on the plaintiff to choose in which of the competent jurisdictions his action will be tried and cannot stand with it." (*Id.*).

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[1] This authority included the decision of the Fifth Circuit in *In re Air Crash Disaster Near New Orleans, La. on July 9, 1982*, 821 F.2d 1147, 1161 (5th Cir. 1987), *vacated on other grounds sub nom. Pan American World Airways, Inc. v. Lopez*, 490 U.S. 1032, 109 S.Ct. 1928, 104 L.Ed.2d 400 (1989) (hereinafter "*New Orleans*"), the District Court's decision in *In re Air Crash off Long Island New York, on July 17, 1996*, 65 F.Supp.2d 207 (S.D.N.Y. 1999) (hereinafter "*Long Island*"), as well as other District Court cases, including, among others, *Coyle v. P.T. Garuda Indonesia*, 180 F. Supp. 2d. 1160, 1170 (D. Or. 2001); *Robert Bosch Corp. v. Air France*, 712 F. Supp. 688, 691 (N.D. Ill. 1989); *Intel Corp. v. Malaysian Airline Sys.*, 652 F. Supp. 1101, 1102 (N.D. Cal. 1987)).

REASONS FOR GRANTING THE PETITION

I.

WHETHER THE DOCTRINE OF FORUM NON CONVENIENS IS AVAILABLE IN CASES GOVERNED BY THE WARSAW CONVENTION IS A QUESTION OF RECURRING IMPORTANCE ON WHICH THE CIRCUITS ARE IN CONFLICT

A. The Decision Below Is In Direct Conflict With Decisions Rendered by the Fifth Circuit Court of Appeals and the Second Circuit Court of Appeals

In *New Orleans*, the Court of Appeals for the Fifth Circuit, in an *en banc* opinion, posed and then answered the following question: "Can a federal district court apply the doctrine of forum non conveniens in a case governed by the Warsaw Convention?" (821 F.2d at 1153). The Court's decision was affirmative: "we hold that article 28(1) of the Warsaw Convention does not prevent a district court from considering and applying the doctrine of forum non conveniens." (*Id.* at 1162).

As the Fifth Circuit elaborated, under Article 28(1), "[t]he party initiating the action enjoys the perogative of choosing between these [four] possible national forums but that selection is not inviolate. That choice is then subject to the procedural requirements and devices that are part of that forum's internal laws." (*Id.* at 1161). The Court added that "[w]e simply do not believe that the United States through adherence to the Convention has meant to forfeit such a valuable procedural tool as the doctrine of forum non

conveniens," referring to commentary to the effect that "[n]o evidence can be found anywhere that the drafters of the Convention intended to alter the judicial system of any country." (*Id.* at 1162).

This was consistent with the opinion of the Court of Appeals for the Second Circuit in *Smith v. Canadian Pacific Airways, Ltd.*, 452 F.2d 798 (2d Cir. 1971). That Court held that:

> in a Warsaw Convention case there are two levels of judicial power that must be examined to determine whether suit may be maintained. The first level . . . is that of jurisdiction in the international or treaty sense under Article 28(1). The second level involves the power of a particular United States court, under federal statutes and practice, to hear a Warsaw Convention case – jurisdiction in the domestic law sense. It is only after jurisdiction in both senses is had that the question of venue is reached and a determination made regarding the appropriateness and convenience for the parties of a particular domestic court. (*Id.* at 800).

The *Smith* Court went on to recognize that only when treaty jurisdiction exists under Article 28(1) is the Court required to consider and "answer domestic jurisdiction and venue questions." *Id.* at 802. Article 28(2) of the treaty expressly mandates that "questions of procedure" are to be governed by the law of the court which has treaty jurisdiction under Article 28(1). *Id.* at 801. The federal common law doctrine of *forum non conveniens* is a procedural principle which empowers a Court with the discretion to determine

whether, in a particular case in which jurisdiction (*viz.*, the Court's power to hear the case) does exist, the Court should exercise that power, or should dismiss the case in favor of a more appropriate venue in a foreign country.

The decision of the Ninth Circuit below and the decisions of the Fifth Circuit in *New Orleans* and the Second Circuit in *Smith* are plainly irreconcilable.

Moreover, as the Court below had to acknowledge, other courts are in accord with the view espoused in *New Orleans* by the Fifth Circuit. Even the English case – the only case in harmony with the Ninth Circuit's decision – acknowledged that "a degree of case precedent around the globe" supports the opposite view – that of the Fifth Circuit and others – that *forum non conveniens* and the Warsaw Convention are compatible one with the other. (*Milor,* [1996] QB 702).

For example, in *Long Island*, litigation stemming from the crash of TWA Flight 800 on July 17, 1996, the District Court rejected the argument that *"forum non conveniens* is not available when Plaintiffs have exercised their option to sue under Article 28 of the Convention." (65 F.Supp.2d at 212). Instead, the court concluded that "while Article 28 limits the fora in which a plaintiff may bring suit, it does not limit the fora to which a court may transfer such suit." (*Id.*) "*Forum non conveniens* is a procedural tool available to U.S. courts. . ." (*Id.* at 214). Analyzing the issue and the drafting history of the treaty, the court found nothing which would "support an alternative interpretation." (*Id.*)

While the *New Orleans* and *Long Island* cases specifically analyzed the issue of whether *forum non conveniens* is a procedural vehicle available in cases governed

by the Warsaw Convention, and concluded that it is, numerous other cases have accepted that proposition as a given. These include decisions of federal District Courts,[2] state courts,[3] and other nations.[4] On this record, the District Court below rightly concluded that "[t]here is simply no case law support for this premise" that the language of Article 28(1) serves as a "fiat that the four fora contemplated by the statute are convenient per se." (App. C at 54a-55a). The District Court noted that "[i]n fact, several cases (including those cited by plaintiffs for other purposes) implicitly undermine the contention, since *forum non conveniens* dismissals are confirmed in Warsaw Convention cases despite the fact that the initial venue was at least statutorily

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[2] See, e.g., *Chukwu v. Air France*, 218 F.Supp.2d 979 (N.D. Ill. 2002); *Gupta v. Austrian Airlines*, 211 F.Supp.2d 1078 (N.D. Ill. 2002); *Yan Wang v. United Airlines, Inc.*, 2001 U.S. Dist. LEXIS 291 (E.D. La. 2001); *Thach v. China Airlines, Ltd.*, 1997 U.S. Dist. LEXIS 7384 (S.D.N.Y. 1997); *Lu v. Air China Intern. Corp.*, 1992 U.S. Dist. LEXIS 20927 (E.D.N.Y. 1992); *Robert Bosch Corp. v. Air France*, 712 F.Supp.688 (N.D. Ill. 1989); *Galu v. Swissair*, 1987 U.S. Dist. LEXIS 12628 (S.D.N.Y. 1987); *Intel Corp. v. Malaysian Airline System*, 652 F.Supp. 1101 (N.D. Cal. 1987); *Byrne v. Japan Airlines, Inc.*, 1984 U.S. Dist. LEXIS 21146 (S.D.N.Y. 1984); *McLoughlin v. Commercial Airways (PTY) Ltd.*, 602 F.Supp. 29 (E.D.N.Y. 1985); *In re Disaster at Riyadh Airport Saudi Arabia on Aug. 19, 1980*, 540 F.Supp. 1141 (D.C. Cir. 1982).

[3] See, e.g., *People ex rel. Compagnie Nationale Air France v. Giliberto*, 383 N.E.2d 977 (Ill. Sup. Ct. 1978)).

[4] See, e.g., *Brinkerhoff Maritime Drilling Corp. v. PT Airfast Services Indonesia*, 1992-2 SLR 776, 1992 SLR LEXIS 453 (1992) (appellate court in Singapore found *forum non conveniens* applicable in a Warsaw Convention case).

permissible. *Lu v. Air China,* 1992 WL 453646 (E.D.N.Y. 1992); *Byrne v. Japan Air Lines,* 1984 WL 1343 (S.D.N.Y. 1984)." (App. C at 55a).

B. The Decision of the Court Below Is Incorrect

1. The Court Erroneously Proclaimed Article 28 Ambiguous

The Court's analysis is founded upon a premise that is entirely without precedent – the notion that Article 28 is ambiguous. (305 F.3d at 996). Neither the Fifth Circuit (in *New Orleans*), the Southern District of New York (in *Long Island*), nor even the English Court of Appeal found *ambiguity* in Article 28. Rather, the Fifth Circuit relied upon the plain text of Article 28; the District Court in *Long Island* relied upon "the literal language of Article 28(2)"; and the English tribunal relied upon "the natural meaning" of the text. (Below, even plaintiffs agreed the text was "clear" and the intent "express").

Because this predicate of "ambiguity" is not only unprecedented, but also erroneous, the Court was led astray in its analysis from the outset. The Court purported to find ambiguity by (1) juxtaposing two cases which construed the text of Article 28 differently (305 F.3d at 994-996), (2) proclaiming the two to be "equally plausible interpretations" of Article 28 (*id.* at 994), and (3) invoking an axiom "that an agreement 'subject to two or more reasonable interpretations . . . is ambiguous' (*id.* at 995)." (Ellipses in original).

Upon examination, however, it is apparent that the court below merely set up *Milor* as a straw man – as a case which purportedly espouses one "reasonable" interpretation

of Article 28. No sooner was the straw man put forward, however, it was knocked down by the Court: the Court went on to reject the fundamental underpinning of the *Milor* decision. The Court went so far as to say that (1) the French dictionary definitions of the authentic text used in Article 28 "do not compel this outcome" which supports *Milor*'s holding (*id.* at 995-995) and (2) "[m]oreover, the recently signed, but not yet ratified, successor to the Warsaw Convention, the 1999 Montreal Convention, uses [these terms from the text] in a manner that undermines the *Milor* court's analysis (*id.* at 996)."

Thus, the Court's own deconstruction of *Milor* demonstrates the error in its characterization of *Milor* as standing as one "plausible" interpretation of Article 28, and, therefore, the Court's ultimate conclusion that there are two reasonable, competing interpretations of Article 28, and thus ambiguity.

The corollary to the canon of construction articulated by the Court is that if, after applying established rules of interpretation, only one reasonable meaning clearly emerges, then the text is *not* ambiguous. *See, e.g., Curcio v. John Hancock Mut. Life Ins. Co.*, 33 F.3d 226, 231 (3d Cir. 1994). That is the situation here. There is no ambiguity, in fact, and none has ever before been found.

2. The Court's Interpretation Ignores Article 28(2)

As the court made clear in *Long Island*, "Article 28(1) must be read in conjunction with Article 28(2), which provides that 'Questions of procedure shall be governed by the law of the court to which the case is submitted.'" (65 F.Supp.2d at 214). Similarly, as the Fifth Circuit

demonstrated, in *New Orleans*, these two subsections are construed together - and *together* set a tripartite analysis. (821 F.2d at 1161 n.21). Indeed, the Fifth Circuit warned of the danger if one were to "ignore the language of article 28(2)" - "American courts could become the forums for litigation that has little or no relationship with this country." (*Id.* at 1162).

The Court's opinion in this case reads subdivision (1) of Article 28 as giving plaintiffs the inviolate right to sue in one of the four specified fora, but in so doing, reads subdivision (2) out of the treaty. The decision below provides no explanation of the import of subdivision (2), much less how the two subdivisions of the same Article apply in unity.

However, treaties, like statutes, should be construed so that no words are treated as meaningless, redundant, or mere surplusage. See, e.g., *Itel Containers Int'l v. Huddleston,* 507 U.S. 60, 65, 113 S. Ct. 1095, 1100, 122 L. Ed. 2d 421 (1993) (refusing to read an international convention in a way that would make some of its language superfluous); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 310-11, 7 L. Ed. 415 (1829) (Marshall, C.J.) ("But the insertion of these words materially affects the construction of the article. They cannot be rejected as surplusage. They have a plain meaning ... . We cannot say they were inserted carelessly or unadvisedly, and must understand them according to their obvious import."); *Cross v. Washington*, 911 F.2d 341, 344 (9th Cir.1990), *cert. denied,* 499 U.S. 922, 111 S. Ct. 1313, 113 L.Ed.2d 247 (1991) (noting that treaties should not be construed so as to render any clause inconsistent or meaningless). See also *Factor v. Laubenheimer*, 290 U.S. 276, 54 S. Ct. 191, 78 L.Ed. 315 (1933) (All the words of a treaty are to be given a meaning, if reasonably possible, and

rules of construction may not be resorted to to render it meaningless or inoperative.)

3. The Court's Interpretation Purports To Advance, But Actually Impedes, The Purposes of The Treaty

As this Court has recognized, "the primary purpose of the contracting parties to the Convention [was] limiting the liability of air carriers in order to foster the growth of the fledgling commercial aviation industry." *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 546, 111 S. Ct. 1489, 113 L. Ed. 2d 569 (1991), *citing Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 256 (1984).

"The second goal of the Convention was to establish uniform rules governing documentation such as airline tickets and waybills and uniform procedure for addressing claims arising out of international transportation." *Id.* at n.11.

Although the Court below said otherwise, its decision does not advance either of these purposes; rather, it undermines the well-recognized goals of the treaty.

The primary purpose of the treaty as articulated by this Court in *Floyd* (limiting air carrier liability) was not acknowledged by the Court of Appeals in this case. Instead, the Court focused on (1) uniformity and (2) a "balance [of] the interests of air carriers against those of passengers." (305 F.3d at 997).

As the Fifth Circuit stated, more than anything else, "the delegates to the Convention were...concerned with limiting the locations in which an air carrier would have to

defend an action, with ensuring that an injured party [would] have an available forum in which to redress his injuries, and with allowing the suit to be heard in a forum that had some interest in the dispute." (*New Orleans*, 821 F.2d at 1161). Through a reasoned application of the private and public interest factors which this Court articulated in *Gilbert*, when an action is properly dismissed on *forum non conveniens* grounds, all of these goals are, by definition, advanced.

In contrast, by eliminating the procedural tool of Article 28(2), notwithstanding its plain text, American courts are certain to become the forum of choice in cases governed by the Warsaw Convention. The reason is simple: monetary recoveries in this country are larger than elsewhere.[5]

Plainly, the goal of limiting airline liability is hampered, not fostered, by a judicial opinion which strips litigants of the procedural doctrine of *forum non conveniens* by writing Article 28(2) out of the Warsaw Convention.

No legal precedent in this country supports the proposition articulated by the Court of Appeals below that the Warsaw "signatories manifested their intent to create not just uniform rules of liability, but also uniform rules of jurisdiction." (305 F.3d at 996). Nor does the Court below explain where this manifestation of intent is to be found. Moreover, if the intent were to "create[] a self-contained code

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[5] In connection with another, more recent case governed by the Warsaw Convention, the chief lawyer representing the plaintiffs in these cases was quoted by the Associated Press as "acknowledg[ing] he wants to hold the trial in the US, where victims are traditionally awarded much higher compensation than in Singaporean, Taiwanese or Australian courts." ("Attorney asks US Court to hear SIA Case," *Taipei Times*, Feb. 23, 2001, p.2).

on jurisdiction" (*id.* at 997) "[b]y including an article addressing jurisdiction" (*id.* at 996) as the Court states, then it is inconceivable that the intent would have been that just half the article (subdivision (1)) would be applicable to questions of jurisdiction and venue, while the other half (subdivision (2)) would serve no purpose at all.

The goal of uniformity is served when claims can be tried where the plaintiffs reside and where their damages can be measured according to local standards, customs and rules of law. Uniformity is not served by a judicial proclamation that the plain language of the treaty, including Article 28(2), does not mean what it says.

4. The "Postratification Understanding" Cited By The Court Undermines The Court's Interpretation Rather Than Supporting It

As the Court below acknowledged, "[i]n 1999, delegates gathered in Montreal to draft a treaty, commonly known as the Montreal Convention, to replace the Warsaw Convention. [Footnote omitted]." (305 F.3d at 999).[6] The aim of the Montreal Convention is to "moderniz[e] and consolidat[e] a seventy-year old system of international instruments of private international law into one instrument that will provide, for years to come, an adequate level of compensation for those involved in international air accidents." (Statement of Dr. Assad Kotaite, President of the Council of ICAO, quoted in Collier, *The Road to Montreal:*

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[6] The treaty is formally named the Convention for the Unification of Certain Rules for International Carriage by Air, done May 28, 1999, ICAO Doc. 9740; S. Treaty Doc. No. 106-45.

Developments in Airline Liability for International Flights & The Impact on Aviation Manufacturers in the U.S." (1999)).

The drafted treaty will gain legal effect after 30 nations deposit instruments of ratification with the International Civil Aviation Organization (DeLeon and Eyskens, "The Montreal Convention: Analysis of Some Aspects of the Attempted Modernization and Consolidation of the Warsaw System," 66 *J. Air L. & Com.* 1155, 1158 n.4 (2001)). Thus far, twenty-five nations have done so. <http://www.icao.int/icao /en/leb/mtl99.htm> (last visited Dec. 11, 2002).

Article 33 of the new treaty is similar to Article 28 of the old one in that it specifies a set of fora in which jurisdiction is proper and assigns to the plaintiff the initial choice of forum. (305 F.3d at 999-1000). However, the new treaty adds a "fifth jurisdiction" to the four originally enumerated in the Warsaw Convention – the principal and permanent residence of the passenger at the time of the accident causing bodily injury or death. DeLeon and Eyskens, *supra*, at 1159-1160. Like Article 28(2) of the Warsaw Convention, Montreal's Article 33(4) incorporates the procedural law of the forum state. (305 F.3d at 1000 n.15).

Although "[t]he United States offered an amendment that would have made explicit a country's right to apply forum non conveniens, provided that the country's procedural rules allowed the doctrine" (*id.* at 1000), as the court below acknowledged, "the United States delegate at one point expressed his opinion 'that the doctrine of *forum non conveniens* would be applied ...in his country whether the [treaty] prescribed that or not.'" (*Id.* at 1001, quoting 1 International Civil Aviation Organization, *International*

Conference on Air Law, Montreal 10-28 May 1999, at 159 (2001)). Thus, no particular significance can be attached to the fact that the treaty as finally worded did not include a reference to *forum non conveniens* by name.

This is particularly true in light of the fact that the United States delegate also made clear that inclusion of the provision for the "fifth jurisdiction" was an absolute necessity if the United States were to sign and ultimately ratify the treaty. Tompkins, "*Hosaka v. United Airlines, Inc.*: A Body Blow to Universal Acceptance of the Montreal Convention 1999?," *Aviation Litigation Quarterly*, Fall 2002 at p.5. Other nations, including those in Europe, the Middle East, Africa and South America, expressed opposition to inclusion of the "fifth jurisdiction." (*Id.*) In the main, these nations were fearful that claimants seeking damages awards measured in United States' quantum, would invoke the "fifth jurisdiction" to bring damages actions in the United States against air carriers domiciled or headquartered in their countries. (*Id.*)

To mollify these concerns, the United States (and other nations, including Canada and Japan), expressed the view that the well-established, common law doctrine of *forum non conveniens* could and would be invoked to dismiss foreign claims brought in the United States courts, just as was true with cases filed in the United States pursuant to the four original Warsaw jurisdictions. (*Id.*)

One commentator has cautioned that "[i]f the *Hosaka* decision stands, then numerous States that are expected to ratify the Montreal Convention, including the European Union States, may have a change of heart. The Montreal Convention, therefore, may not achieve the principal objective of universality envisaged by its supporters." (*Id.*)

Not only is the doctrine of *forum non conveniens* likely essential if final implementation of the Montreal treaty is to be achieved, but as part of the Montreal scheme, the doctrine will serve a beneficial social purpose. It has been observed that application of *forum non conveniens*, under the Montreal regime, should help ensure that "plaintiffs receive fair and quick compensation." Heinonen, "The Warsaw Convention Jurisdiction and the Internet," 65 *J. Air L. & Com.* 453 (2000).

Professor Allan Mendelsohn has forecast that "[t]he practice of US courts using the [*forum non conveniens*] doctrine should accelerate if Article 28 is generally widened to include the victim's domicile or habitual place of residence as the fifth forum." Mendelsohn, "Domicile and the Warsaw System," 22:1 *Annals of Air and Space Law* 137, 140 (1997). This would well serve the interests of justice.

As Professor Mendelsohn suggests, "[a] combination of increased *Piper*-inspired FNC dismissals and a widened Article 28 should create a climate that will work to streamline and expedite the Warsaw settlement process well before most cases are even filed. *Id.* at 141. And in those instances in which lawsuits are filed, "victims of all aviation accidents, no matter the site of the crash, would be served most fairly if the damages claims filed . . . could be . . . litigated in the courts of their own countries."[7] *Id.* at 138-139.

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[7] As Professor Mendelsohn adds: "It is only there that the [plaintiffs] could get the most accurate assessment of damages so that they are able to live comfortably and do not become wards of that State. It is also those courts that are most aware of cultural differences that affect damages determinations as well as other social . . . benefits that may be available to the [plaintiffs] and whether or not these should be factored into a damages award."

These principles are particularly apt in the cases at bar – cases involving the individualized damages of nearly 50 people, each with his or her particularized losses and damages, evidenced if at all by witnesses (who speak Japanese) and documents (written in Japanese) which are located exclusively in Japan.

Because the Court of Appeals below ultimately found the text and drafting history of the Warsaw Convention and the Montreal Convention (intended to supercede Warsaw) inconclusive (as to "whether the Warsaw Convention language, standing alone, permits or precludes application of forum non conveniens") (305 F.3d at 1001), it instead placed considerable emphasis upon "[t]he history of *other* international agreements." (*Id.*) (Emphasis added).

To do so, the Court cobbled together the drafting and negotiating history of *another* international treaty (the Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters, Sept. 27, 1968) (*id.*) and even *another draft* treaty (the Hague Conference on Private International Law) (*id.* at 1001-1002). Both are far removed from the international commercial aviation treaty at issue in the cases at bar. Nevertheless, however, the Court below was apparently able to satisfy itself that from this *other* history, there was "support[] [for] the conclusion that the Warsaw Convention's silence on forum non conveniens does not permit that doctrine's application." (*Id.* at 1001).

The notion that the drafting history of one treaty provides a useful tool for ascertaining the intentions of the drafters of an entirely different treaty, negotiated decades

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Id. at 139.

earlier, in a different country, for a different purpose, is questionable at best. Indeed, one significant flaw in this "methodology" is highlighted by an observation made by the Court below, to the effect that "[t]here are many possible reasons the United States would have chosen to ratify" a treaty containing or omitting particular language in the context of a particular treaty at a particular time. (305 F.3d at 1002).

II.

CONCLUSION

A writ of certiorari should be granted to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Dated: December 17, 2002

Respectfully submitted,

Clinton H. Coddington
Counsel of Record

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-15223, No. 00-15224, No. 00-15225, No. 00-15226, No. 00-15228, No. 00-15229, No. 00-15230, No. 00-15231, No. 00-15238, No. 00-15239, No. 00-15241, No. 00-15242, No. 00-15243, No. 00-15244, No. 01-15120, No. 01-15123, No. 01-15124, No. 01-15131

[Filed September 18, 2002]

KATSUKO HOSAKA, individually and on behalf of the Estate and heirs of SADAO HOSAKA,
Plaintiff-Appellant,
v.
UNITED AIRLINES, INC.; UAL CORPORATION,
Defendants-Appellees.

TAKEO YOSHIKAWA; KIMIKO YOSHIKAWA; YAE YOSHIKAWA; AYAKO YOSHIKAWA; YUKI YOSHIKAWA; YOSHIKAWA; MIYOKO NAKAZATO,
Plaintiffs-Appellants,
v.
UNITED AIRLINES, INC.; UAL CORPORATION,
Defendants-Appellees.

TAKEHITO YOSHIKAWA; NAMI YOSHIKAWA; SACHIYO YOSHIKAWA, a minor, and CHIZURU YOSHIKAWA, a minor by and through their guardian ad litem TAKEHITO YOSHIKAWA,
Plaintiffs-Appellants,
v.
UNITED AIRLINES, INC.; UAL CORPORATION,
Defendants-Appellees.

NOBUYUKI TANAKA; KINUYO TANAKA; YUKIKO TANAKA; MAKIKO TANAKA,
Plaintiffs-Appellants,
v.
UNITED AIRLINES, INC.; UAL CORPORATION,
Defendants-Appellees.

KOJA TESHIMA; KUMIKO TESHIMA,
Plaintiffs-Appellants,
v.
UNITED AIRLINES, INC.; UAL CORPORATION,
Defendants-Appellees.

KOZO YAMADA; ISA YAMADA; MASHIKO YAMADA; CHIZURU YAMADA,
Plaintiffs-Appellants,
v.
UNITED AIRLINES, INC.; UAL CORPORATION,
Defendants-Appellees.

NOBUAKI MIZUNO; TAKAKO MIZUNO,
Plaintiffs-Appellants,
v.
UNITED AIRLINES, INC.; UAL CORPORATION,
Defendants-Appellees.

TAKASHI ONISHI; JUNKO ONISHI;
MASAYA ONISHIS; MIHIKO ONISHI,
Plaintiffs-Appellants,
v.
UNITED AIRLINES, INC.; UAL CORPORATION,
Defendants-Appellees.

YASUO TANAKA; SUSUMU TANAKA;
AYAKO TANAKA,
Plaintiffs-Appellants,
v.
UNITED AIRLINES, INC.; UAL CORPORATION,
Defendants-Appellees.

NUBUO SHIGA,
Plaintiff-Appellant, and
KIMEE SHIGA,
Plaintiff,
v.
UNITED AIRLINES, INC.; UAL CORPORATION,
Defendants-Appellees.

IZUMI TOSAKA,
Plaintiff-Appellant,
v.
UNITED AIRLINES, INC.; UAL CORPORATION,
Defendants-Appellees.

HATSUMI ITO,
Plaintiff-Appellant,
v.
UNITED AIRLINES, INC.; UAL CORPORATION,
Defendants-Appellees.

TAKAMASA KATAURA,)
Plaintiff-Appellant, and)
MACHIE TAIRA,)
Plaintiff,)
v.)
UNITED AIRLINES, INC.; UAL CORPORATION,)
Defendants-Appellees.)
)
KAORI ITO,)
Plaintiff-Appellant,)
v.)
UNITED AIRLINES, INC.; UAL CORPORATION,)
Defendants-Appellees.)
)
SHUICHI INAKO; HISAKO INAKO;)
OSAMU INAKO; HIROSHI INAKO,)
a minor, by and through his guardian ad litem)
Shuichi Inako,)
Plaintiffs-Appellants,)
v.)
UNITED AIRLINES, INC.; UAL CORPORATION,)
Defendants-Appellees.)
SHUICHIRO MINAMI; YURIKO MINAMI;)
TAKAHIRO MINAMI, a minor, by and through)
guardian ad litem Shuichiro Minami;)
TOMOHIRO MINAMI, a minor, by and through)
guardian ad litem Shuichiro Minami,)
Plaintiffs-Appellants,)
v.)
UNITED AIRLINES, INC.; UAL CORPORATION,)
Defendants-Appellees.)

MASAKI KONUMA,
Plaintiff-Appellant,
v.
UNITED AIRLINES, INC.; UAL CORPORATION,
Defendants-Appellees.

KEIKO HIRASE,
Plaintiff-Appellant,
v.
UNITED AIRLINES, INC.; UAL CORPORATION,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
D.C. No. CV-99-02905-MJJ, D.C. No. CV-99-03710-MJJ,
D.C. No. CV-99-03708-MJJ, D.C. No. CV-99-02939-MJJ,
D.C. No. CV-99-02912-MJJ, D.C. No. CV-99-02911-MJJ,
D.C. No. CV-99-03712-MJJ, D.C. No. CV-99-04219-MJJ,
D.C. No. CV-99-02909-MJJ, D.C. No. CV-99-02908-MJJ,
D.C. No. CV-99-02907-MJJ, D.C. No. CV-99-02906-MJJ,
D.C. No. CV-98-04075-MJJ, D.C. No. CV-99-02210-MJJ,
D.C. No. CV-99-05063-MJJ, D.C. No. CV-99-05062-MJJ,
D.C. No. CV-99-05308-MJJ, D.C. No. CV-99-05061-MJJ
Martin J. Jenkins, District Judge, Presiding

JUDGES
Before: Stephen Reinhardt and Raymond C. Fisher, Circuit Judges, and Donald W. Molloy, District Judge. *

* The Honorable Donald W. Molloy, Chief Judge, United States District Court for the District of Montana, sitting by designation.

OPINION

FISHER, Circuit Judge

In these consolidated appeals, plaintiffs challenge the district court's dismissal of their actions on the ground of forum non conveniens. Plaintiffs brought claims under the Warsaw Convention arising out of injuries sustained when their United Airlines flight from Tokyo to Hawaii encountered turbulence over the Pacific Ocean. Applying the federal common law doctrine of forum non conveniens, the district court dismissed plaintiffs' actions in favor of a more convenient forum in Japan. Plaintiffs contend it was error for the district court to entertain United's motions for forum non conveniens because the Warsaw Convention, which establishes four forums in which an action arising under the treaty must be brought, precludes application of that doctrine here. We agree. We hold that Article 28(1) of the Warsaw Convention overrides the discretionary power of the federal courts to dismiss an action for forum non conveniens.[1] Accordingly, the judgments of the district court dismissing these actions on the ground of forum non conveniens are reversed.

PROCEDURAL HISTORY

These related cases were brought by passengers on United Air Lines Flight 826, which was scheduled to fly from

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[1] We have no occasion to decide whether state courts may apply their own doctrines of forum non conveniens to actions arising under the Warsaw Convention.

Tokyo, Japan to Honolulu, Hawaii on December 29, 1997. Flight 826 encountered severe turbulence over the Pacific Ocean, approximately three hours into the flight. The turbulence resulted in the death of one passenger and injuries to many others. Flight 826 then diverted course and returned to Tokyo. Several of the injured passengers, and in some cases family members who were not passengers on the flight, brought suit to recover damages under the Warsaw Convention, a multilateral treaty governing the international carriage of passengers, baggage and cargo by air drafted in 1929 and adhered to by the United States in 1934.

The district court granted United's two motions to dismiss for forum non conveniens.[2] The court held that Article 28(1) of the Warsaw Convention, which sets forth four forums in which an action must be brought and grants the plaintiff the option of choosing among these jurisdictions, did not act as a procedural bar to the court's entertainment of a motion to dismiss for forum non conveniens. Plaintiffs appealed. We have jurisdiction over these appeals under 28 U.S.C. § 1291 and we reverse.

DISCUSSION

I.

We review a district court's interpretation of treaties

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[2] The district court had before it 18 related cases, each of which it dismissed on the ground of forum non conveniens. It dismissed 14 of them on January 7, 2000 and the remaining four on December 19, 2000. All 18 cases are consolidated for the purposes of this appeal.

de novo. *United States v. Idaho,* 210 F.3d 1067, 1072 (9th Cir. 2000), *aff'd,* 533 U.S. 262, 150 L. Ed. 2d 326, 121 S. Ct. 2135 (2001). Our interpretation of the Warsaw Convention begins with the text. *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 167, 142 L. Ed. 2d 576, 119 S. Ct. 662 (1999). If the plain text is ambiguous, we look to other sources to elucidate the treaty's meaning, *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134, 104 L. Ed. 2d 113, 109 S. Ct. 1676 (1989), including the purposes of the treaty, its drafting history, the postratification understanding of the contracting parties and the decisions of the courts of other signatories. *See Tseng*, 525 U.S. at 167-76. Throughout, "it is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Air France v. Saks*, 470 U.S. 392, 399, 84 L. Ed. 2d 289, 105 S. Ct. 1338 (1985). Here, although the text is ambiguous, the purposes, drafting history and treatment of the issue elsewhere compel us to conclude that forum non conveniens is not available in the Warsaw Convention actions giving rise to these appeals.

A. *Text*

"Our inquiry begins with the text." *Tseng*, 525 U.S. at 167. The text of the Warsaw Convention is silent on the availability of the doctrine of forum non conveniens. Questions of jurisdiction and procedure, however, are governed by Article 28, which states:

> (1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier

> or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.
>
> (2) Questions of procedure shall be governed by the law of the court to which the case is submitted.

Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, 3020-21, T.S. No. 876 (1934), note following 49 U.S.C. § 40105.[3]

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[3] Citations in this opinion are to the official United States translation of the Convention. *See* 49 Stat. 3014-23. Where relevant, we also provide the Convention's governing French text. *See* 49 Stat. 3000-09; *Saks*, 470 U.S. at 397. The French text of Article 28 reads:

> (1) L'action en responsabilité devra êtra porteé, au choix du demandeur, dans le territoire d'une des Hautes Parties Contractantes, soit devant le tribunal du domicile du transporteur, due siège principal de son exploitation où du lieu ou il possède un établissement par le soin duquel le contrat a été conclu, soit devant le tribunal du lieu de destination.
>
> (2) La procédure sera réglée par la loi du tribunal saisi.

49 Stat. at 3007.

This text is susceptible to two equally plausible interpretations, as the following two decisions illustrate.[4] In *Milor v. British Airways, Plc.*, [1996] Q.B. 702, 706 (Eng. C.A.), the British Court of Appeal concluded that the text precluded the forum non conveniens doctrine, reasoning that the "the procedural power to stay on the ground of forum non conveniens is... inconsistent with the right conferred on the plaintiff to choose in which of the competent jurisdictions his action will be tried...."[5] Under this view of the text, the scope of the forum state's procedural law incorporated by Article 28(2) is subject to Article 28(1), which grants to the plaintiff

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[4] Were we construing an act of Congress, our analysis of the same text would be different because we presume that federal statutes' venue provisions do not preempt forum non conveniens unless Congress' contrary intent is manifestly clear. *See Creative Tech., Ltd. v. Aztech System Pte, Ltd.*, 61 F.3d 696, 700 (9th Cir. 1995). This rule of construction, however, does not control in the case of international treaties. *See Tseng*, 525 U.S. at 175 ("Our home-centered preemption analysis ...should not be applied, mechanically, in construing our international obligations."). The Warsaw Convention is not an act of Congress, which acts with a backdrop favorable to forum non conveniens. Rather, the Convention was "drafted in French by continental jurists," *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 536, 113 L. Ed. 2d 569, 111 S. Ct. 1489 (1991), to whom the forum non conveniens doctrine was contrary to their national laws. *See* Section I. C, *infra*. We therefore analyze the text neutrally, without a thumb on the scale in favor of forum non conveniens.

[5] The *Milor* decision, as an "opinion[] of our sister signator[y]," is "entitled to considerable weight." *Saks*, 470 U.S. at 404.

an absolute right of choice as between four presumptively convenient jurisdictions.

Also plausible, however, is the textual interpretation adopted in *In re Air Crash off Long Island New York, on July 17, 1996*, 65 F. Supp. 2d 207, 214 (S.D.N.Y. 1999), in which the court reasoned that the text of Article 28(2) plainly incorporates the forum state's procedural law. Because forum non conveniens is a feature of United States procedural law, *see Am. Dredging Co. v. Miller*, 510 U.S. 443, 453, 127 L. Ed. 2d 285, 114 S. Ct. 981 (1994), "*[f]orum non conveniens* is a procedural tool available to U.S. courts and thus squarely falls within the literal language of Article 28(2)." *In re Air Crash off Long Island*, 65 F. Supp. 2d at 214; *accord In re Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982*, 821 F.2d 1147, 1161 (5th Cir. 1987) (en banc) (holding that the Warsaw Convention permits application of forum non conveniens because the plaintiff's choice under Article 28(1) is "subject to the procedural requirements and devices that are part of that forum's internal laws"). It is axiomatic that an agreement "subject to two or more reasonable interpretations ...is ambiguous." *Gen. Accident Ins. Co. v. Unity/Waterford-Fair Oaks, Ltd.*, 288 F.3d 651, 653 (5th Cir. 2002).

In adopting its interpretation of Article 28, the *Milor* court also deemed it significant that the governing French text uses the word "*portee*" in Article 28(1), where it states that an action must be "brought" in one of the competent jurisdictions, while using the word "*intentee*" in Article 29, governing the timeliness of the lawsuit, where it states that an

action must be "brought" within two years.[6] It is a sound principle of treaty construction that where the drafters used two different words it "implies that the drafters of the Convention understood the word[s]...to mean something different..., for they otherwise logically would have used the same word in each article." *Saks*, 470 U.S. at 398. Applying this principle, the British court reasoned that the use of

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[6] Article 29(1) states:

> (1) The right to damages shall be extinguished if an action is not brought within 2 years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped.
>
> (2) The method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted.

49 Stat. at 3021. The French text states:

> (1) L'action en responsibilité devra êtra intentée, sous piene de déchéancs, dans le délai de deux ans à compter de l'arrivée à destination ou du jour où l'aéronef aurait dû arriver, ou de l'arrêt du transport.
>
> (2) Le mode du calcul du délai est déterminé par la loi du tribunal saisi.

49 Stat. at 3007.

"*intentee*" in Article 29 must convey a "narrow meaning" of brought, namely "initiated," whereas the use of "*portee*" in Article 28 must carry a broader meaning, namely "commenced and pursued." [1996] Q.B. at 707. The latter meaning, *Milor* reasoned, would foreclose a forum transfer.

Plaintiffs ask us to adopt the *Milor* court's textual analysis here, but we decline to do so. Although the use of two different words implies different meanings, we cannot ascertain why the use of *portee* requires that the action must be litigated to conclusion in the forum selected by the plaintiff. The dictionary meanings of the French terms do not compel this outcome.[7] Moreover, the recently signed, but not yet ratified, successor to the Warsaw Convention, the 1999 Montreal Convention, uses *portee* and *intentee* in a manner that undermines the *Milor* court's analysis. Article 33(1) of the Montreal Convention, which is designed to replace Article 28(1) of the Warsaw Convention, states that "[a]n action for damages must be brought, at the option of the plaintiff," in one of four jurisdictions, and uses the word *portee*, just like the 1929 original. Convention for the Unification of Certain

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[7] *See* Cassell's French and English Dictionary 251 (J.H. Douglas, D. Girard & W. Thompson eds. 1986) (defining *porter* as "to carry, to bear, to support; to endure; to bring; to take"); The Oxford-Hachette French Dictionary 627 (M. Correard & V. Grundy eds. 1994) (defining *porter plainte* as "to lodge a complaint"); Cassell's French and English Dictionary, *supra*, at 192 (defining *intenter une action* or *un procés à or contre quelu'un* as "to enter or bring an action against someone"); The Oxford-Hachette French Dictionary, *supra*, at 438 (defining *intenter un procés à* as "to sue" and *intenter un action contre* as "to bring an action against").

Rules for International Carriage by Air done at Montreal on 28 May 1999, S. Treaty Doc. No. 106-45, art. 33; Convention Pour L'Unification de Certaines Régles Relatives au Transport Aéren International, art. 33, *available at* http://www.icao.int/icaonet/dcs/9740.pdf (last visited Aug. 6, 2002).[8] The next paragraph, Article 33(2), states that "in respect of damage resulting from the death or injury of a passenger, an action may be brought before one of the courts mentioned in paragraph 1 of this Article, or in the territory...." *Id.* The French text of this Article employs *intentee* rather than *portee*. The Montreal Convention's usage suggests that any difference in the meanings of these words is not dispositive. In sum, we conclude that the text of Article 28 is ambiguous.

B. *Purpose*

Where the text of a treaty is ambiguous, we may look to the purposes of the treaty to aid our interpretation. *See Tseng*, 525 U.S. at 169-72. "The cardinal purpose of the Warsaw Convention...is to 'achiev[e] uniformity of rules governing claims arising from international air transportation.'" *Tseng*, 525 U.S. at 169 (quoting *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 552, 113 L. Ed. 2d 569, 111 S. Ct. 1489 (1991)) (second alteration in original). By including an article addressing jurisdiction, the signatories

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[8] Note that, whereas only the French text of the Warsaw Convention is authentic, the French and English texts of the Montreal Convention are equally authentic. Convention for the Unification of Certain Rules for International Carriage by Air done at Montreal on 28 May 1999, S. Treaty Doc. No. 106-45, text following art. 57.

manifested their intent to create not just uniform rules of liability, but also uniform rules of jurisdiction.[9] As the British court concluded in *Milor*, through Article 28 the signatories "create[d] a self-contained code on jurisdiction" that "harmonise[s] different national views on jurisdiction." [1996] Q.B. at 707 (quoting lower court). Application of the doctrine of forum non conveniens would undermine the goal of uniformity. As the *Milor* court observed, "that harmony would inevitably be to some extent disturbed if by the use of the forum non conveniens doctrine a plaintiff would be denied the right in some countries to sue in one of the four forums nominated in article 28(1) of the Convention, but not denied that right in others." *Id.* (quoting lower court). It also would subject actions brought under the Convention to a doctrine that itself is "vague and discretionary," *United States v. Nat'l City Lines, Inc.*, 334 U.S. 573, 581, 92 L. Ed. 1584, 68 S.

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[9] The Supreme Court's decision in *American Dredging* is not to the contrary. There, the Court held that a state's application of forum non conveniens did not "'interfere[] with the proper harmony and uniformity' of maritime law." 510 U.S. at 451. Because maritime law's requirement of uniformity was intended to reach only those matters that "bear upon the substantive right to recover," forum non conveniens was not inconsistent with that requirement. *Id.* at 454. Here, by contrast, the existence of Article 28(1) manifests the drafters' intent to reach matters of jurisdiction and to require uniformity in the rules governing the plaintiff's choice of forum. *See* Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 498-99 & n.8 (1967) (describing Article 28(1)'s jurisdictional rules as an element of the treaty's uniformity).

Ct. 1169 (1948), and that "is most unlikely to produce uniform results." *Am. Dredging Co.*, 510 U.S. at 453.

The second purpose of the Convention is to balance the interests of air carriers against those of passengers. *See Tseng*, 525 U.S. at 170. Once again, the scope of this objective extends beyond rules governing liability to those concerning jurisdiction. By permitting the plaintiff to bring suit in four limited forums, but granting the plaintiff the option of choosing among those jurisdictions, the Convention likewise struck "a compromise between the interests of air carriers and their customers worldwide." *Tseng*, 525 U.S. at 170. "[W]hen giving the plaintiff an option as to which of the competent jurisdictions to choose as the forum, the high contracting parties were conferring a deliberate benefit on a plaintiff in circumstances where they had to weigh the interests of a customer of an airline on the one hand and the airline on the other." *Milor,* [1996] Q.B. at 709. Permitting defendants to utilize forum non conveniens to cancel out the plaintiff's choice would undermine this balance just as it would undermine uniformity. The doctrine of forum non conveniens is inconsistent with the Convention's dual purposes of uniformity and balance.

C. *Drafting History*[10]

The drafting history also supports plaintiffs' position. During the 1929 conference, the British delegation proposed an amendment that would have expressly preserved a court's discretion to decline jurisdiction in an action brought under the Convention, as long as the procedural rules of the forum state permitted the exercise of such discretion. The British proposal would have added the following paragraph to what ultimately became Article 28:

> None of the stipulations of this Article shall be deemed to bind any court whatsoever to hear a complaint which it would consider, according to the principles of law and procedure in force in the country to which the said court belongs, as contrary to the rules of justice, or as irrelevant to be submitted to it.

Minutes of the Second International Conference on Private Aeronautical Law 298-99 (Oct. 4-12, 1929) (R. Horner & D.

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[10] The United States did not participate in the work of the drafting committee and sent only an advisor to the Warsaw Conference. *See* Lowenfeld & Mendelsohn, *supra*, 80 Harv. L. Rev. at 502; Minutes of the Second International Conference on Private Aeronautical Law 10 (Oct. 4-12, 1929) (R. Horner & D. Legrez trans., 1975) (hereinafter "Minutes"). This fact does not, however, lessen the significance of the drafting history. *See, e.g., Chan*, 490 U.S. at 137 (Brennan, J., concurring).

Legrez trans., 1975) (hereinafter "Minutes").[11] The British argued that "[a] stipulation of this nature would avoid all interference in the discretionary power of the courts, and would give them more latitude to repress vexatious litigation, as in the case where the 'forum' of another country would be naturally indicated as being that where the debates should take place." *Id.* at 299.[12] This proposal was referred to committee, but what happened within the committee is unclear. The official minutes of the Convention report only that:

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[11] The British proposal would have amended Article 26 of the preliminary draft. By the time of the final draft, Article 26 had been renumbered as Article 28.

[12] Although not using the term "forum non conveniens," the proposal accurately reflected the doctrine as it existed in England at the time. *See, e.g., Logan v. Bank of Scotland,* [1906] 1 K.B. 141, 150 (reasoning that actions that involve "such vexation and oppression that the defendant who objects to the exercise of the jurisdiction would be subjected to such injustice that he ought not to be sued in the Court in which the action is brought"); *see also* Ronald A. Brand, *Comparative Forum Non Conveniens and the Hague Convention on Jurisdiction and Judgments*, 37 Tex. Int'l L.J. 467, 470-71 (2002) (describing development of forum non conveniens in England); Alexander Reus, *Judicial Discretion: A Comparative View of the Doctrine of Forum Non Conveniens in the United States, the United Kingdom, and Germany*, 16 Loy. L.A. Int'l & Comp. L.J. 455, 477-79 (1994) (same). For a discussion of the development of the doctrine within the United States, see Section II, *infra*.

> There was a British proposal consisting in adding a paragraph to say that the courts had the right not to act when certain provisions could be contrary to rules of law of the country. The British Delegation did not insist.

Id. at 169.

This drafting history has been described as "inconclusive." *In re Air Crash off Long Island*, 65 F. Supp. 2d at 214. We do not know whether the amendment was considered and rejected by the delegates or if it merely was abandoned by the British. That said, the failed British amendment is not irrelevant. That the British delegation proposed an explicit incorporation of the doctrine of forum non conveniens strongly suggests that the contracting parties were cognizant of the doctrine and did not understand Article 28(2) as silently incorporating, or acquiescing in, its application.

It is even more difficult to construe Article 28(2) as silently incorporating or acquiescing in the application of forum non conveniens when one considers the historical context in which the British amendment was offered and, more generally, in which the treaty was drafted and negotiated. The Supreme Court repeatedly has counseled against adopting an interpretation of the Convention that would have been discordant or offensive to the majority of signatories. In *Floyd*, where the Court held that Article 17 of the Convention does not allow recovery for mental or psychic injuries unaccompanied by physical injury, the Court declined to read into the treaty a claim that "would not have been recognized in many... countries represented at the Warsaw

Convention." 499 U.S. at 540. Similarly, in *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 223, 133 L. Ed. 2d 596, 116 S. Ct. 629 (1996), the Court refused to construe the Convention as permitting an action for nonpecuniary harm where "[m]any signatory nations...did not, even many years after the Warsaw Convention, recognize a cause of action for nonpecuniary harm." We will not adopt the construction that "would be controversial for most signatory countries." *Floyd*, 499 U.S. at 552.

Following these rules of construction, we do not infer from the treaty's incorporation of local procedural law that the drafters acquiesced in the application of forum non conveniens, a concept that was (and is) both alien to and unwelcome by the majority of the contracting parties. Forum non conveniens, which permits a court having jurisdiction to decline it, is a feature of the common law. "[T]he Convention," however, "was drafted by civil law jurists, to whom *forum non conveniens* was an alien concept." *In re Air Crash off Long Island*, 65 F. Supp. 2d at 214; *see also* Ronald A. Brand, *Comparative Forum Non Conveniens and the Hague Convention on Jurisdiction and Judgments*, 37 Tex. Int'l L.J. 467, 468 (2002) ("The doctrine of forum non conveniens generally is unknown in legal systems following the continental civil law model."); James L. Baudino, Comment, *Venue Issues Against Negligent Carriers - International and Domestic Travel: The Plaintiff's Choice?*, 62 J. Air L. & Com. 163, 192-95 (1996) (surveying civil and common law countries' current practices regarding discretionary jurisdiction).

In this historical light, it is unreasonable to infer that the "continental jurists," *Floyd*, 499 U.S. at 536, would have

succumbed to the British, common law point of view. The more reasonable inference is that the delegates, if they had intended to permit the application of forum non conveniens, would have done so explicitly. Paraphrasing the Supreme Court's statement in *Floyd*: "Because such a remedy was unknown in many, if not most, jurisdictions in 1929, the drafters most likely would have felt compelled to make an unequivocal reference to [forum non conveniens] if they had specifically intended to allow such [a procedure]." *Floyd*, 499 U.S. at 545; *see also Milor*, [1996] Q.B. at 708 ("[It] would be surprising if the high contracting parties had preserved to that small minority of countries which applied the doctrine of forum non conveniens a power to affect the choice of the forum in which a dispute should be tried by a process unknown to the majority of the parties.").[13]

D. *Postratification Understanding*

Plaintiffs contend that more recent history supports the view that the language in Article 28(2), standing alone, does not permit forum non conveniens. In 1999, delegates gathered

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[13] We also cannot assume that the drafters would have understood the doctrine of forum non conveniens to be a "[q]uestion[] of procedure," as that term was used in Article 28(2). Half a century after the Convention was drafted, it remained an unsettled question in the United States whether forum non conveniens constituted a procedural rule within the meaning of *Erie R. Co. v. Tomkins*, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938). *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 248 n.13, 70 L. Ed. 2d 419, 102 S. Ct. 252 (1981) (declining to reach "the *Erie* question"); *cf. Am. Dredging Co.*, 510 U.S. at 453 (describing forum non conveniens as procedural, although not in the context of *Erie* analysis).

in Montreal to draft a treaty, commonly known as the Montreal Convention, to replace the Warsaw Convention.[14] Article 33 of the new treaty is similar to Article 28 of the old one.[15] It specifies a set of forums in which jurisdiction is

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[14] The official name of the new treaty, *see* Section I.A., *supra*, is the Convention for the Unification of Certain Rules for International Carriage by Air done at Montreal on 28 May 1999, S. Treaty Doc. No. 106-45. The treaty was completed and signed in 1999, but will not take effect (and replace the Warsaw Convention) until it has been ratified by the requisite number of countries.

[15] Article 33 provides:

> 1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the court at the place of destination.
>
> 2. In respect of damage resulting from the death or injury of a passenger, an action may be brought before one of the courts mentioned in paragraph 1 of this Article, or in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft, or on another carrier's aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with

proper and assigns to the plaintiff the choice of forum. Article 33(4), like Article 28(2), incorporates the procedural law of the forum state. In support of their contention, plaintiffs cite the following secondary account of the proceedings by one of the participants:

> Attempts were made by delegates from common law states to introduce language which would permit the application of the doctrine of *forum non conveniens* by courts in which proceedings were commenced. Considerable objections were made by delegates from various civil law jurisdictions, who complained that the doctrine was unknown in their jurisdictions and ought not to be imposed upon them by international treaty.

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which it has a commercial agreement.

3. For the purposes of paragraph 2,

(a) "commercial agreement" means an agreement, other than an agency agreement, made between carriers and relating to the provision of their joint services for carriage of passengers by air;

(b) "principal and permanent residence" means the one fixed and permanent abode of the passenger at the time of the accident. The nationality of the passenger shall not be the determining factor in this regard.

4. Questions of procedure shall be governed by the law of the court seised of the case.

> The US delegation asserted confidently that *forum non conveniens* motions would be appropriate in treaty cases notwithstanding the absence of substantial case law demonstrating successful applications in that jurisdiction, and the absence of any provision in the final text of the Convention shows that the civil law jurisdiction delegates prevailed on this issue.

Sean Gates, *The Montreal Convention of 1999: A Report on the Conference and on What the Convention Means for Air Carriers and Their Insurers*, Aviation Q. 186, 189 (1999).[16]

The official minutes of the Montreal Convention tell a less conclusive story, however. The United States offered an amendment that would have made explicit a country's right to apply forum non conveniens, provided that the country's procedural rules allowed the doctrine. The United States' proposal would have amended the draft of Article 33(4) to read: "Questions of procedure shall be governed by the law of the Court seised of the case, *including the doctrine of forum non conveniens or other similar doctrines.*" 1 International Civil Aviation Organization, *International Conference on Air Law, Montreal 10-28 May 1999*, at 159 (2001) (Minutes) (proposed addition in italics); *see also id.* at 179-80. Notwithstanding the United States' proposal, the final

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[16] Gates, legal advisor to the international Union of Aviation Insurers, participated as an observer in the drafting of the Montreal Convention. *See* 1 International Civil Aviation Organization, *International Conference on Air Law, Montreal 10-28 May 1999*, at 28, 161 (2001) (Minutes).

version of the Montreal Convention did not include the proposed language.

The drafting history, however, does not establish conclusively that the delegates understood the United States' proposal as a change to the Warsaw regime. Nor does it suggest that the absence of the United States' proposal dealt a blow to forum non conveniens. On the contrary, the drafting history of the Montreal treaty reflects a lack of a shared understanding on the issue that occupies us here: whether the Warsaw Convention language, standing alone, permits or precludes application of forum non conveniens. Every side of this issue found a voice at the Montreal conference. For instance, the United States delegate at one point expressed his opinion "that the doctrine of *forum non conveniens* would be applied ...in his country whether the [treaty] prescribed that or not." *Id.* at 159. The British delegate, by contrast, voiced the view that the Warsaw Convention entitled a plaintiff to an absolute choice among four forums, a choice that could not be undermined by forum non conveniens. *Id.* at 162. The drafting history lacks any conclusive statement by the remaining delegates accepting or rejecting either of these positions. In sum, although forum non conveniens was discussed at length in Montreal, the drafting history does not paint a coherent picture of the parties' understanding of the Warsaw Convention.[17]

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[17] We offer no opinion as to whether the text and drafting history of the Montreal Convention demonstrate whether forum non conveniens would be available in an action brought under that as-yet-unratified treaty.

The history of other international agreements, however, supports the conclusion that the Warsaw Convention's silence on forum non conveniens does not permit that doctrine's application. For instance, the Brussels Convention, which governs enforcement of judgments among European Union countries, was first agreed to in 1968, when only civil law nations were members of the Union.[18] As drafted, the treaty contained no explicit forum non conveniens doctrine and was construed as barring the doctrine's application. Alan Reed, *To Be or Not to Be: The Forum Non Conveniens Performance Acted Out on Anglo-American Courtroom Stages*, 29 Ga. J. Int'l & Comp. L. 31, 84-85, 106-12 (2000). When the United Kingdom and Ireland joined the European Economic Community in 1979, they tried to negotiate the introduction of a forum non conveniens clause in the Convention, but their efforts were rebuffed. Martine Stuckelberg, *Lis Pendens and Forum Non Conveniens at the Hague Conference*, 26 Brook. J. Int'l L. 949, 962-63 (2001).

Moreover, when a multilateral treaty has meant to allow application of the doctrine, the treaty has said so explicitly. In this respect, the recent negotiating history of the Hague Conference on Private International Law is instructive. The unfinished task of the Hague Conference is the formulation of an international convention on jurisdiction and enforcement of foreign judgments in civil and commercial matters. The participants, including the United States,

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[18] The formal name of the treaty is the Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters, Sept. 27, 1968.

vigorously debated the availability of forum non conveniens. *See* Fritz Blumer, *Jurisdiction and Recognition in Transatlantic Patent Litigation*, 9 Tex. Intell. Prop. L.J. 329, 392-93 (2001). This debate culminated in a compromise expressly allowing "suspension of a case, in exceptional circumstances, if the court seised is clearly inappropriate to decide the case and if a court of another State has jurisdiction and is clearly more appropriate to resolve the dispute." Stuckelberg, *supra*, 26 Brook. J. Int'l 14296 L. at 971. The draft treaty therefore adopts a version of the doctrine of forum non conveniens that balances common law countries' interests against those of civil law countries. The explicit incorporation of a compromise version of forum non conveniens in the draft Hague treaty supports the conclusion that forum non conveniens was not silently incorporated in the Warsaw Convention. *Cf. Floyd*, 499 U.S. at 545 (reasoning that the Warsaw Convention signatories did not intend to permit recovery for purely psychic injuries where a later international transport treaty included an explicit reference to mental injury that had not been included in the Warsaw treaty).

II.

The only other circuit to have addressed the issue presented in these appeals is the Fifth Circuit, which held "that article 28(1) of the Warsaw Convention does not prevent a district court from considering and applying the doctrine of forum non conveniens." *In re Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982*, 821 F.2d 1147, 1162

(5th Cir. 1987) (en banc).[19] The persuasiveness of the Fifth Circuit's decision is limited in several respects. The decision did not consider the purposes, drafting history and postratification understanding of the parties, all of which are pertinent tools of construction articulated by the Supreme Court in decisions postdating the Fifth Circuit's analysis. Moreover, the Fifth Circuit in 1987 did not have the benefit of the more recent *Milor* decision.

In any event, we are not persuaded by the court's reasoning. Observing that, under the plaintiffs' construction, "American courts could become the forums for litigation that has little or no relationship with this country," the court found it hard to "believe that the United States through adherence to the Convention has meant to forfeit such a valuable procedural tool as the doctrine of forum non conveniens." *Id.* We respectfully disagree. There are many possible reasons the United States would have chosen to ratify even knowing

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[19] As noted, one district court has agreed with the Fifth Circuit. *See In re Air Crash off Long Island New York, on July 17, 1996*, 65 F. Supp. 2d 207, 214 (S.D.N.Y. 1999). The doctrine also has been applied in other federal cases in which the issue of the Warsaw Convention's preemptive effect was not discussed. *See, e.g., Coyle v. P.T. Garuda Indonesia*, 180 F. Supp. 2d. 1160, 1170 (D. Or. 2001); *Robert Bosch Corp. v. Air France*, 712 F. Supp. 688, 691 (N.D. Ill. 1989); *Intel Corp. v. Malaysian Airline Sys.*, 652 F. Supp. 1101, 1102 (N.D. Cal. 1987).

that the doctrine of forum non conveniens would not be available in actions brought under the treaty.[20]

At the time of the drafting and ratification of the Convention, the forum non conveniens doctrine was not the "valuable procedural tool" that it might be considered today. The doctrine traces its origins to eighteenth century Scottish law, *Am. Dredging Co.*, 510 U.S. at 449, but in 1929 the doctrine was only beginning to take hold in the United States. United States courts applied the doctrine sparingly, "as a nameless principle of law through which a court could decline to exercise jurisdiction, particularly in maritime cases between a foreign plaintiff and foreign defendant." Michael T. Manzi, Comment, *Dow Chemical Company v. Castro Alfaro: The Demise of Forum Non Conveniens in Texas and One Less Barrier to International Tort Litigation*, 14 Fordham Int'l L.J. 819, 823 (1990/1991). The Supreme Court first approved the principle of a court's discretionary power to decline jurisdiction in 1929. *See Douglas v. New York, New Haven & Hartford R.R. Co.*, 279 U.S. 377, 73 L. Ed. 747, 49 S. Ct. 355 (1929) (holding that a state court did not violate the Privileges and Immunities Clause of the Constitution by declining jurisdiction in an action between citizens of another

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[20] No legislative history exists regarding the United States' ratification. *See Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 273, 80 L. Ed. 2d 273, 104 S. Ct. 1776 (1984) (Stevens, J., dissenting) ("The President submitted the Convention to the Senate in 1934, which gave its advice and consent by voice vote without committee hearings, committee reports, or floor debate.") (citing 78 Cong. Rec. 11582 (1934)).

state).[21] Even after that date, "state and federal courts did not begin to employ forum non conveniens widely except in maritime cases, and cases involving the internal affairs of a corporation." Manzi, *supra*, *14 Fordham Int'l L.J. at 823*. It was not until 1932, in *Canada Malting Co. v. Paterson S.S., Ltd.*, 285 U.S. 413, 76 L. Ed. 837, 52 S. Ct. 413 (1932), that the Supreme Court held that the exercise of discretionary powers by United States courts in declining jurisdiction should not be restricted to admiralty cases. Only in 1941, in *Baltimore & Ohio R.R. Co. v. Kepner*, 314 U.S. 44, 55-56, 86 L. Ed. 28, 62 S. Ct. 6 (1941) (Frankfurter, J., dissenting), did one justice of the Court describe the doctrine as "firmly imbedded in our law." Not until *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 91 L. Ed. 1055, 67 S. Ct. 839 (1947), did "the forum non conveniens doctrine finally enjoy[]express acknowledgment." Reus, *supra*, 16 Loy. L.A. Int'l & Comp. L.J. at 461; *see also* Stuckelberg, *supra*, 26 Brook. J. Int'l L. at 955 ("Until the middle of the twentieth century, the exception was very limited and a dismissal only could be ordered if the forum was 'oppressive or vexatious' to the defendant."). "[T]he doctrine of *forum non conveniens* was not fully crystalized" until the 1947 *Gilbert* decision. *Piper Aircraft*, 454 U.S. at 248.

In sum, that the doctrine of forum non conveniens might be characterized as a valuable procedural tool today does not mean that it was so in 1929, when the participating

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[21] Commentator Paxton Blair first dubbed the American courts' application of discretionary dismissal "forum non conveniens," adopting the Scottish term, in 1929. *See* Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 Colum. L. Rev. 1, 21 (1929).

nations applied the finishing touches to the treaty, or even in 1934, when the United States ratified it. Thus, we have no difficulty imagining that the United States would have sacrificed application of this modestly important procedural tool to obtain the benefits of the Convention. As Sir Alfred Dennis, the head of the British delegation, remarked, "As regards the British Government, the sole reason which it has for entering into this Convention is the desire to achieve uniformity....The draft of the Convention is contrary, on several points, to our laws and to our customs, but we have decided to make sacrifices to obtain this uniformity." Minutes at 35-36. Even in the United States, we have never considered the doctrine to be of such importance that it should override all other concerns. *See, e.g., United States v. Nat'l City Lines, Inc.*, 334 U.S. 573, 596-97, 92 L. Ed. 1584, 68 S. Ct. 1169 (1948) (holding that forum non conveniens is not available in actions brought under the Clayton Act).

III.

Although the text of the Warsaw Convention is ambiguous, the purposes and drafting history of the treaty, as well as evidence of the parties' postratification understanding and treatment of the issue in other treaties and by other courts, persuade us that the contracting parties did not intend to permit the plaintiff's choice of national forum to be negated by the doctrine of forum non conveniens. We therefore hold that Article 28(1) of the Warsaw Convention precludes a federal court from dismissing an action on the ground of forum non conveniens.

The reach of our decision is limited to the application of forum non conveniens to dismiss a case in favor of a forum in *another* country. Our decision does not affect whether a particular United States court has subject matter jurisdiction over a case; nor does it alter a federal court's power to transfer a case *within* the United States pursuant to 28 U.S.C. § 1404(a). *See In re Air Crash Disaster Near New Orleans*, 821 F.2d at 1161 n.21 (explaining that Article 28(1) relates only to whether jurisdiction in the international or treaty sense is established and does not determine the power of a particular United States court, under federal statutes and practice, to hear a Warsaw Convention case or affect whether venue is proper and convenient in a particular federal court); *Smith v. Canadian Pac. Airways, Ltd.*, 452 F.2d 798, 800 (2d Cir. 1971) (same).

CONCLUSION

We reverse the orders of the district court dismissing these actions on the basis of forum non conveniens. We therefore do not reach the remaining issues raised in these appeals.[22]

REVERSED AND REMANDED

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[22] Plaintiffs argue that the district court erred in the choice of law analysis included in its decision to dismiss on the basis of forum non conveniens, an issue mooted by our reversal on other grounds. To the extent choice of law issues remain in the case, nothing we decide today should be interpreted as a validation of the district court's choice of law analysis as articulated in the forum non conveniens context.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 99-5061 MJJ
and related cases:
C 99-5062 MJJ, 99-5063 MJJ, 99-5308 MJJ

[Filed December 19, 2000]

KEIKO HIRASE,	)
Plaintiffs,	)
v.	)
	)
UNITED AIRLINES, INC. and	)
UAL CORPORATION,	)
Defendants.	)
	)

ORDER DISMISSING PLAINTIFFS' ACTIONS FOR *FORUM NON CONVENIENS*

Before the Court is Defendants United Airlines, Inc. and UAL Corporation's (collectively referred to as "United") motion to dismiss this action and three related cases on grounds of *forum non conveniens*. Having carefully considered the papers submitted by the parties, and having had the benefit of oral argument on December 12, 2000, the Court hereby GRANTS the motion.

BACKGROUND

These four related cases arise from the incident involving United Airlines Flight 826 which encountered turbulence while en route from Tokyo to Honolulu on December 28, 1997. Fourteen other cases arising from the same incident were previously before this Court, but in an order filed January 7, 2000, the Court dismissed those actions on grounds of *forum non conveniens*. The Court finds that the claims made by the plaintiffs in the instant four cases, as well as the alleged injuries which underlie those claims, are substantially analogous to the claims and injuries alleged in the fourteen previously dismissed actions. Therefore, the Court incorporates into this Order all of the findings and conclusions of its January 7, 2000 Order.

Incorporation of the Court's January 7, 2000 Order is especially appropriate given that the arguments offered by United and the plaintiffs for the instant motion significantly overlap with the arguments made regarding the *forum non conveniens* motion in the fourteen dismissed actions. Plaintiffs do offer several new arguments in their briefing of the current motion. However, as discussed in detail below, none of the new arguments persuade the Court to reach a different result than that reached in the fourteen previously dismissed cases. To the contrary, Japan, and not the United States, continues to provide the proper forum for legal actions arising from the Flight 826 incident.

DISCUSSION

A. Legal Standard

Dismissal on grounds of *forum non conveniens* is permissible where: (1) an adequate alternative forum exists and (2) the balance of private and public factors favors dismissal. See *Contact Lumber v. P.T Moges,* 918 F.2d 1446, 1449 (9th Cir. 1990). A *forum non conveniens* determination is committed to the sound discretion of the trial court. *See Piper Air v. Reyno,* 454 U.S. 235, 257 (1981). Thus, where the court considers all relevant public and private interest factors, and where the balancing of those factors is reasonable, substantial deference is accorded. *See id.* "If the balance of conveniences suggest that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper." *Id.* at 256 n. 23.

B. Plaintiffs' New Arguments Against Dismissal

For the most part, the plaintiffs' Opposition to United's motion to dismiss the cases presently before the Court merely repeats or expands upon the arguments they made in the fourteen dismissed actions. As discussed in Section C, below, dismissal on grounds of *forum non conveniens* remains appropriate. First, however, the Court finds that none of the new arguments offered in the plaintiffs' Opposition preclude dismissal on grounds of *forum non conveniens.*

1. Access to Liability Evidence/ NTSB Report

The plaintiffs contend that the United States is the proper forum for these cases because all evidence regarding United's potential liability is located in the United States. To support this argument, the plaintiffs now rely extensively on the National Transportation Safety Board's ("NTSB") draft investigation report of the Flight 826 incident. According to the plaintiffs, the NTSB conducted a thorough investigation of the incident, and all of the NTSB's findings are located in the United States. Moreover, the plaintiffs contend that the evidence relied on by the NTSB is found in the United States. In particular, the NTSB interviewed many United States residents and examined numerous United documents which are located in the United States.

The circumstances surrounding the NTSB's draft report, however, are irrelevant to this Court's *forum non conveniens* determination because United's liability is of little consequence in these particular cases. These four related actions are governed by the Warsaw Convention (the "Convention"), the IATA Intercarrier Agreement; the Agreement on Measures to Implement the IATA Intercarrier Agreement, and the tariffs filed by United with the Department of Transportation. Under Article 17 of the Convention, carriers are strictly liable for accidents causing passenger injury, however, Article 22(1) limits recoverable compensatory damages arising under Article 17 to $75,000. The damages cap does not apply where the carrier's willful misconduct caused the accident. See Article 25(1). Carriers may also avail themselves of two defenses under the Convention. Article 20(1) provides a defense to liability where the carrier can show that it took all measures to prevent

and avoid harm, while Article 21 provides a defense based on a passenger's contributory negligence.

Application of the Convention provisions to United has been modified by United's tariffs. In particular, United has waived Article 22(1)'s $75,000 limitation on liability and United has waived the preventive-measures defense provided by Article 20(1) as to that portion of such a claim which does not exceed 100,000 special drawings rights (as of October 13, 2000, 100,000 Special Drawing Rights equaled $129,356.40).

These tariff provisions, together with Article 17's imposition of strict carrier liability, have effectively removed liability as a disputed issue in the Flight 826 cases. The plaintiffs' argue that liability is at issue because if they are able to prove willful misconduct, the $75,000 liability limit provided by Article 22(1) will not apply. However, this argument has no weight given the fact that United has already foregone Article 22(1)'s limitation on recovery. Furthermore, United's tariffs create the possibility that plaintiffs will obtain a recovery that is greater than that provided for under the Convention provisions. Although Article 20(1) potentially permits a carrier to avoid *all* liability if it can show that it took all measures to prevent passenger harm, United, in its tariffs, has agreed only to invoke this defense against that portion of a claim which exceeds 100,000 special drawings rights.

Of course, establishing a preventive-measures defense under Article 20(1) involves evidence of United's liability. However, this alone does not make this Court a convenient forum for purposes of *forum non conveniens*. Since United's underlying liability for passenger injury is presumed under the

Convention, the primary issue in the case will continue to be the amount of damages recoverable by the plaintiffs. Meanwhile, if United intends to use the defense provided by Article 20(1), it will have the burden of proving that its preventive measures should reduce its liability (to the extent that the claim exceeds 100,000 special drawings rights). Any inconvenience suffered by United in meeting this burden will be caused by its own decision to act as the proponent of an affirmative defense.

A contributory negligence defense under Article 21 will also implicate liability issues. Yet, this defense revolves around the liability *of the plaintiffs*. Such evidence exists in Japan with the plaintiffs themselves, their doctors, other passengers aboard Flight 826, and those with whom the plaintiffs discussed the incident.

Pursuant to the provisions of the Warsaw Convention and United's tariffs, United's liability for the Flight 826 incident is not a disputed issue in these cases. Therefore, even assuming that evidence of United's liability is located in the United States, the United States in not necessarily the proper forum for resolving the plaintiffs' claims.[1]

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[1] The Court also finds that the particular liability evidence relied on by the plaintiffs, all of which derives from the NTSB's draft report, does not preclude application of the *forum non conveniens* doctrine. First, the NTSB has not yet issued its final report on the Flight 826 incident. Even after a final report is issued, its use will be limited in a U.S. court. Under 49 U.S.C. § 1154(b), any conclusions contained in an NTSB report cannot be introduced at trial. Further, to the extent that the NTSB report contains relevant evidence, it may be used in legal proceedings in Japan.

2. Montreal Protocol No. 4

A new argument offered by the plaintiffs is based on Montreal Protocol No. 4. According to the plaintiffs, that international agreement bars the application of the *forum non conveniens* doctrine to Warsaw Convention actions.

The Montreal Protocol No. 4, however, does not apply to this action because it was not ratified by the United States Senate until September 28, 1998, nine months after the Flight 826 incident, and the terms of the Montreal Protocol are not retroactive. *See El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 160-161 (1999) (Supreme Court acknowledged that the exclusivity question presented had been "settled prospectively" by the Montreal Protocol, but then went on to consider the exclusivity question as to claims that pre-dated ratification of the Montreal Protocol). Meanwhile, even if the Montreal Protocol No. 4 applied to these cases, it does not forbid the application of the *forum non conveniens* doctrine to cases involving the Convention. The plaintiffs unconvincingly argue that because the Montreal Protocol No.

Also, the plaintiffs disregard the involvement of Japanese authorities in the Flight 826 incident. The Aircraft Accident Investigation Commission (the "AAIC") of the Japanese Ministry of Transportation conducted an investigation of the Flight 826 incident, and its findings shed light on two key issues in these cases. The AAIC investigated the injuries suffered by passengers of Flight 826, and thus its report will be relevant to damage determinations. The AAIC also determined whether passengers were wearing seatbelts when Flight 826 encountered turbulence, and those findings will provide crucial evidence on the question of contributory negligence.

4 is silent on the issue of *forum non conveniens*, the doctrine was necessarily rejected by its signatories. A review of the evidence submitted in support of the plaintiffs' Opposition reveals that although civil law nations did not want the *forum non conveniens* doctrine explicitly permitted by the Montreal Protocol No. 4, they did not in any way demonstrate an intent to forbid the doctrine's application in Convention cases.

United States courts have consistently applied the *forum non conveniens* doctrine to actions governed by the Convention. *See, e.g., In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147, 1159 (5th Cir. 1987); *In re Air Crash off Long Island New York, on July 17, 1996*, 65 F.Supp.2d 207 (S.D.N.Y. 1999); *Byrne v. Japan Airlines*, 1984 WL 1343 (S.D.N.Y. 1984); *Lu v. Air China*, 1992 WL 453646 (E.D.N.Y. 1992). These decisions are not incongruent with the Convention's forum provision: Article 28 provides four possible forums for claims governed by the Convention, and is silent as to whether the *forum non conveniens* doctrine applies when the chosen forum is inconvenient.

Contrary to the plaintiffs' contentions, the Montreal Protocol No. 4 does not preclude application of the *forum non conveniens* doctrine to the four cases currently before the Court.

3. Purported Changes to the Law of *Forum Non Conveniens*

Plaintiffs incorrectly argue in their Opposition brief that recent clarifications of the *forum non conveniens* doctrine

require a different outcome in these four cases than that reached in the 14 previously dismisses cases.

First, Judge Legge's order in *In re Air Crash off Point Magu, California* (MDL-001343 CAL) does not create any new rights to use or access NTSB or carrier investigation reports. Judge Legge ordered the preservation of relevant evidence of a crash for possible future use in litigation. Such an order is consistent with previously existing law, namely, 49 U.S.C. § 1154(b) which allows facts, but not conclusions, from an investigation report to be used at trial.

Second, the Ninth Circuit's decision in *Monegro v. Rosa,* 211 F.3d 509 (9th Cir. 2000) did not alter the application of the *forum non conveniens* doctrine in this circuit. The *forum non conveniens* analysis in *Monegro,* like this Court's analysis in its January 7, 2000 Order, was guided by the legal standards set forth in *Piper Aircraft v. Reyno*, 454 U.S. 235 (1981). Admittedly, the *Monegro* court cited to a *forum non conveniens* standard that, through its word choice, could disfavor motions based on the *forum non conveniens* doctrine: "the standard to be applied [to a motion to dismiss on the ground of *forum non conveniens*] is whether... defendants have made a clear showing of facts which... establish such *oppression and vexation* of a defendant as to be out of proportion to plaintiff's convenience, which may be shown to be slight or nonexistence." *Monegro*, 211 F.3d at 514 (quoting *Cheng v. Boeing Co.*, 708 F.2d 1406, 1410 (9th Cir. 1983) (emphasis added). However, this statement of the *forum non conveniens* standard is not new – it comes from a 1983 case – nor does it mark a departure from previous Ninth Circuit law – a moving defendant continues to have the burden of showing that the inconveniences placed on it by the

plaintiff's chosen forum significantly outweigh any convenience enjoyed by the plaintiff.

Finally, Judge Breyer's recent decision *in Husain v. Olympic Airways* (C 99-1400 CRB) does not alter this Court's reasoning from the fourteen dismissed cases. Judge Breyer acknowledged that contributory negligence is a defense in Warsaw Convention actions, and further concluded that liability under the Convention is apportioned according to the comparative responsibility or causation of the parties. The *Husain* decision does not alter the liability issues in the instant cases. As explained above, United is strictly liable for accidents causing injury to a passenger, but may reduce the amount of recoverable compensatory damages by proving it took measures to prevent or avoid injury or by showing the contributory negligence of the passenger.

In sum, the plaintiffs have failed to point to any new case law which forecloses dismissal of the instant four cases on grounds of *forum non conveniens*.

Forum Non Conveniens

1. Adequacy of Japan As Alternative Forum

Japan offers an adequate alternative forum for plaintiffs' pursuit of their legal claims. First, United is amenable to process in Japan, and even if it was not, it has agreed to submit to the personal jurisdiction of the court in Japan for purposes of this litigation. *See Piper,* 454 U.S. at 254 n.22. Second, Japan is not so "clearly unsatisfactory" a forum as to warrant denial of *forum non conveniens* dismissal.

See id. at 254-55; *Lockman Found. v. Evangelical Alliance Mission*, 930 F.2d 765, 769 n.3 (recognizing that an adequate alternative forum existed in Japan and cataloging cases in which the basic institutional soundness of Japan's legal system has been confirmed).

2. Private Interest Factors Favor Japan

The determination of what forum is most convenient rests upon several "private interest" and "public interests" factors which a court should consider and balance when presented with a motion to dismiss for *forum non conveniens*. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-9 (1947). Turning first to the private interest factors, this Court finds that the private interests in these four related cases favor Japan as the proper forum.

First, the relative ease of access to sources of proof leads to a conclusion that Japan is the proper forum for these cases. As discussed earlier, proof of United's liability is, at best, only tangentially relevant to these cases because United is strictly liable under the Warsaw Convention and has waived that agreement's limitation on monetary recoveries. In contrast, proof as to the plaintiffs' damages will be crucial in these actions. Such evidence is almost exclusively located in Japan. All of the plaintiffs in these four related cases are residents and citizens of Japan. They received medical care for their injuries in Japan, and if they lost wages due to their injuries, they lost such wages from their employment in Japan for Japanese employers. The only damages evidence located in the U.S. comes from written forensic reports prepared by experts who were hired by the plaintiffs' attorneys for

purposes of this litigation. Considerations regarding the Court's access to proof clearly favor a trial in Japan.

The location and availability of witnesses also favors litigation in Japan. Most of the witness on the pertinent issue of the plaintiffs' damages reside in Japan. Any unwilling witnesses, would escape the reach of compulsory process from this Court. In addition, the expense of transportation of willing witnesses imposes another obstacle to litigation in a United States court.

Language problems would further hinder litigation in the United States. Much of the plaintiffs' documentary and testimonial case-in-chief would be in Japanese, and as such, would require translation for trial. This burden is especially problematic with respect to the issue of damages since each plaintiff has individual injuries, individual treating physicians, and separate family members testifying as to their damages. Litigation in Japan may also face language and translation difficulties if the NTSB's accident report is admitted as evidence. However, given that the issue of liability – for which the NTSB report is relevant – is not central to these cases, the burden created by the use of a foreign language falls more heavily on a United States court. Overall, this factor weighs in favor of Japan as the proper forum.

3. Public Interest Factors Favor Japan

The public factors governing a court's *forum non conveniens* analysis include the administrative difficulties placed on congested courts, the imposition of jury duty on the people of a community which has no relation to the litigation, and the appropriateness of conducting a trial in a forum "that

is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in laws foreign to itself." *Gulf Oil*, 330 U.S. at 509. After considering these factors, the Court finds that the public interest factors favor Japan as the proper forum.

The congested dockets of this Court weigh in favor is dismissing the remaining Flight 826 cases because they have little connection to this forum. More importantly, the attenuated connection of this district's jury venire to the well-being of Japanese citizens weighs heavily against burdening a jury in this forum, particularly in these cases where the trial promises to be lengthy and linguistically problematic. *See Pain v. United Technology Corp.*, 637 F.2d 775, 792 (D.C. Cir. 1980).

Furthermore, choice of law considerations do not support the convenience of a United States court for these cases.[2] Under Article 25(1) of the Convention which governs carrier liability in cases of willful misconduct, the law of the

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[2] United adequately raised the issue of choice of law in its opening motion for dismissal. Accordingly, the proper place for plaintiffs to respond to this issue was in their opposition brief. Plaintiffs did so, however, they also sought to introduce a voluminous "offer of proof" subsequent to the filing of United's reply brief. The plaintiffs' submission amounts to an improper sur-reply. Moreover, it attempts to present argument on issues for which plaintiffs already had an opportunity to address during the ordinary briefing process. Consequently, the Court disregarded these supplemental materials in considering the merits of the pending motion.

forum where the case is submitted will apply. Moreover, the choice of law rules of that forum will apply. *See Insurance Co. of North Amer. v. Federal Express Corp.*, 189 F.3d 914, 919-920 (9th Cir.1999). In California, the choice of law rules employ the government interest approach. The plaintiffs in this case make an extensive argument as to why, under the governmental interest approach, American rather than Japanese law should control in this case. This argument, however, suffers from several flaws. First, the entire argument only relates to the particular issue of willful misconduct under Article 25, which as explained above, is not relevant in this action due to the terms of United's tariffs. Second, the conclusion that American law should govern is based on the plaintiffs' disregard for Japan's interest in this case. As demonstrated by the AAIC's investigation of the Flight 826 incident, Japan has an interest in the plaintiffs' cases. Thus, contrary to the plaintiffs' Opposition brief, it is not imminently clear that the government interest approach favors the application of American law. Since it is unclear whether American or Japanese law would apply in these cases, choice of law concerns are neutral with respect to the Court's *forum non conveniens* analysis.

CONCLUSION

Based on the foregoing, and for the reasons set forth in the Court's January 7, 2000 Order in the fourteen previously dismissed actions, the Court hereby GRANTS United's motion to dismiss on grounds of *forum non conveniens*. The Court, however, explicitly conditions

dismissal upon the following conditions:[3] (1) that United consent to jurisdiction in Japan; (2) that United waive any statute of limitations defense arising from the time interval from the filing of any individual suit in this Court to a filing of the parallel suit in Japan; (3) that United take no legal position inconsistent with the position taken in this Court that Article 29(1) is a statute of limitation; (4) that United take no legal position inconsistent with the position taken in this Court that United's tariff filings (a) waive the limitation on liability set forth in Article 22(1) of the Warsaw Convention as to any claim for recoverable compensatory damages arising under Article 17 and (b) waive any defense under Article 20(1) of the Warsaw Convention as to that portion of such a claim which does not exceed 100,000 Special Drawings Rights; (5) that the Japanese courts actually assume subject matter jurisdiction over the actions refiled in Japanese courts; and (6) that United agree to satisfy any judgment against it by a Japanese court. As to the first, second, third, fourth, and sixth points, United shall file and serve a written undertaking within twenty (20) days of the date of this Order indicating its agreement to these terms as conditions of dismissal. On the fifth point, the parties shall apprise the Court of any relevant developments in the Japanese courts.[4]

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[3] Courts frequently predicate the grant of a *forum non conveniens* motion on a defendant's representations regarding jurisdiction, amenability to process, enforceability of judgment, and waiver of defenses that would have arisen directly from the delay in filing suit in the wrong forum initially. *See, e.g., Contact Lumber*, 918 F.2d at 1450; *Cheng*, 708 F.2d at 1409.

[4] The parties should note that an additional condition has been added to the conditions that were provided for in the Court's

IT IS SO ORDERED.

Dated: 12/17/2000 /S/_____
MARTIN J. JENKINS
UNITED STATES
DISTRICT JUDGE

January 7, 2000 Order. Specifically, condition number 4 has been added to account for United's representations regarding the waivers of limitation on liability that are found in its tariffs.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 98-4075 MJJ and related cases: C 99-2210 MJJ, C 99-2905 MJJ, C 99-2906 MJJ, C 99-2907 MJJ, C 99-2908 MJJ, C 99-2909 MJJ, C 99-2911 MJJ, C 99-2912 MJJ, C 99-2939 MJJ, C 99-3708 MJJ, C 99-3710 MJJ, C 99-3712 MJJ, C 99-4210 MJJ

[Filed January 7, 2000]

KATAURA, et al.,
Plaintiffs,

v.

UNITED AIRLINES and
UAL CORPORATION,

Defendants.

ORDER DISMISSING PLAINTIFFS' ACTIONS FOR *FORUM NON CONVENIENS*

INTRODUCTION

Before the Court are the motions of defendants United Air Lines and UAL, Inc. (collectively "United") to dismiss the above-captioned actions on *forum non conveniens* grounds. For the reasons outlined below, the Court GRANTS United's motions to dismiss with certain, enumerated conditions.

FACTUAL BACKGROUND

These related cases are brought by passengers on United Air Lines Flight 826, which was scheduled to fly from Tokyo, Japan to Honolulu, Hawaii on December 29, 1997. Flight 826 encountered severe air turbulence over the Pacific Ocean, approximately three hours into the flight. The turbulence resulted in the death of one passenger,[1] and injuries to many others. Flight 826 then diverted course and returned to Tokyo. Several of the injured passengers, and in certain cases family members who were not passengers on the flight, brought suit to recover damages under the Warsaw Convention, 49 U.S.C. § 40105 *et seq.*[2]

The Court granted United's motion to dismiss plaintiffs' common law claims, finding that the Warsaw

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[1] The survivors of the deceased passenger have also filed suit in this Court, but that case, *Kataura v. United Air Lines,* Case No. C 98-4075 MJJ, has settled.

[2] The complaints are identical in their recitation of the operative facts and requests for relief, differing only in the specific injuries alleged by each individual plaintiff.

Convention provides the exclusive remedy for damages for injuries suffered attendant to international air travel. Now before the Court is United's motion to dismiss for forum non conveniens. United seeks to move this litigation to Japan, which it claims offers an adequate and more convenient forum. In support of the present motion, United has filed much of the Rule 26 information provided by each individual plaintiff, and described the evidentiary methods of proof likely necessary for each defendant's damages case. United claims that these disclosures, which are largely in the Japanese language, first made it clear that this forum was inappropriate, and that the litigation would more suitably be undertaken in Japan.

LEGAL ANALYSIS

I. *Forum Non Conveniens*

A. Legal Standard

Unlike motions to transfer venue from one domestic court to another, which are governed by statute, *forum non conveniens* motions are resolved with resort to federal common law. A *forum non conveniens* determination is committed to the sound discretion of the trial court. *Piper Air v. Reyno,* 454 U.S. 235, 257 (1981). A party moving to dismiss for *forum non conveniens* must show two things: (1) the existence of an adequate alternative forum, and (2) that the balance of private and public factors favors dismissal. *Contact Lumber v. P. T. Moges*, 918 F.2d 1446, 1449 (9th Cir. 1990). Where the court considers all relevant public and private interest factors, and where the balancing of those

factors is reasonable, substantial deference is accorded. *Piper*, 454 U.S. at 257.

The starting point of this inquiry is that plaintiffs are ordinarily entitled to choose the forum in which to sue. *Gulf Oil v. Gilbert*, 330 U.S. at 508. However, this presumption is weaker where the plaintiffs are not U.S. citizens or residents. *Piper*, 454 U.S. at 255-256 ("When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure that a trial is convenient, a foreign plaintiff's choice deserves less deference"); *see also Gemini Capital Group v. Yap Fishing Corp.*, 150 F.3d 1088, 1091 (9th Cir. 1998). The presumption should be upset only where factors clearly point towards trial in the alternative forum. "If the balance of conveniences suggest that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper." *Piper*, 454 U.S. at 256 n. 23.

Piper suggests a more even-handed evaluation than that suggested by earlier precedent, which set oppressiveness, vexatiousness, or extreme inconvenience to the defendant as the standard for *forum non conveniens* dismissal. *Koster v. Lumbermens' Mutual Cas. Co.*, 330 U.S. 518, 524 (1947). Inappropriateness of the forum due to the Court's own "administrative and legal problems" is also a factor to weigh. *Piper*, 454 U. S. at 241, *citing Koster*, 330 U. S. at 524.

B. Threshold Issues

1. Waiver by Inaction/Consent

Plaintiffs have questioned United's very entitlement to bring this motion, claiming that their delay in moving, as well as their successful request for affirmative relief from this Court (*i.e.* United's intervening 12(b)(6) motion to dismiss non-Warsaw Convention claims), operates as a waiver of United's right to bring a *forum non conveniens* motion. Plaintiffs quote a Fifth Circuit case providing that *forum non conveniens* motions must be made within a reasonable time of the defendant's recognition of the issue. *In re Air Crash Disaster Near New Orleans, La. on July 9, 1982*, 821 F.2 d 1147, 1165 (5th Cir. 1987) (defendant must assert a motion to dismiss for *forum non conveniens* "within a reasonable amount of time after the facts and circumstances which serve as the basis for the motion have developed and become known or reasonably knowable to the defendant"). United argues that its motion would be timely even under plaintiffs' suggested standard, in that the convenience of trying the case in Japan was brought home only upon receipt of plaintiffs' Rule 26 disclosures beginning in October 1999. This seems to be a legally reasonable, if not entirely commonsensically defensible, delay on this record.[3]

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[3] In contrast, United claims it was able to identify the pleading deficiency attacked in its initial round of 12(b)(6) motions from a reading of the complaints themselves. However, the issues regarding inconvenient forum were allegedly not apparent from the complaint alone.

While waiver can be an issue in motions to transfer, the issue has not directly arisen in the *forum non conveniens* context. Therefore, absent this Court articulating a new principle of procedural law in this context, and disregarding United's justification for its timing, the objection has no foothold in law. The Court is not overjoyed with the prospect of negating its existing investment of judicial resources in this matter, but acknowledges that the *In re Air Crash* standard does not bar United from bringing this motion.[4]

B. Effect of Warsaw Convention on Plaintiff's Choice of Forum

Plaintiffs' second threshold argument relies on the language of the Warsaw Convention. Specifically Article 28(1) states: "An action for damages may be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or his principal place of business, or where he has a place of business through which the contract has been made,

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[4] *In re Air Crash* instead suggests that the factor of timeliness should be considered as one of the "practical concerns" among the private interest factors in a Court's analysis under *Gulf Oil, infa.* 821 F.2d at 1165, n.30. *See also In re Air Crash Off Long Island N.Y. on July 17, 1996*, 65 F. Supp. 2d 207, 210-11 (S.D.N.Y. 1999). Thus, the Court notes that plaintiffs' implicit premise in defending United's motion – *i.e.*, that timeliness is an extrinsic bar to the applicability of the forum non conveniens factors outlined in *Gulf Oil* – is suspect. Were the Court to consider timeliness in the context of *Gulf Oil*, it would reach the conclusion that the delay in bringing the instant motion, while perhaps avoidable in part, does not inure against the private interests of the parties and the Court.

or before the court of the place of destination." Plaintiffs read this language as a statutory fiat that the four fora contemplated by the statute are convenient per se.[5] There is simply no case law support for this premise. In fact, several cases (including those cited by plaintiffs for other purposes) implicitly undermine the contention, since *forum non conveniens* dismissals are confirmed in Warsaw Convention cases despite the fact that the initial venue was at least statutorily permissible. *Lu v. Air China,* 1992 WL 453646 (E.D.N.Y. 1992); *Byrne v. Japan Air Lines,* 1984 WL 1343 (S.D.N.Y. 1984). Most notably, the Fifth Circuit has rejected the premise that the four competent fora under Article 28(1) are *per se* convenient. "We are of the opinion that article 28(1) offers an injured passenger or his representative four forums in which a suit for damages may be brought. The party initiating the action enjoys the prerogative of choosing between these possible national forums but that section is not inviolate. That choice is then subject to the procedural requirements and devices that are part of that forum's internal laws...We simply do not believe that the United States through adherence to the Convention has meant to forfeit such a valuable procedural tool as the doctrine of *forum non conveniens." In re Air Crash,* 821 F.2d at 1161-2. Accordingly, the Court does not find Article

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[5] Neither party addresses why the Northern District of California meets the definition of any of the Article 28(1) fora. It would seem not to fit the bill. Plaintiffs neither purchased their ticket in this judicial district, nor were they scheduled to land here. United is a Delaware company headquartered outside of Chicago, Illinois. While this issue is beyond the purview of the current motions, it raises further questions as to the appropriateness of this forum.

28(1) to act as a procedural bar to this Court's entertainment of a motion to dismiss for *forum non conveniens*.

Existence of an Acceptable Alternative Forum

A. Available Forum

Ordinarily, the alternative forum is available where the defendant is 'amenable to process' in the alternative jurisdiction. *Piper*, 454 U.S. at 254 n.22. Defendant has stated its amenability to process in Japan, and more is not required. The Court will make this a condition of dismissal, as several other courts have in granting dismissal for *forum non conveniens*. *See infra.*

This is sufficient to satisfy the basic availability requirement under the common law. *Lockman*, 930 F.2d at 768. With this in place, the Court must focus on adequacy, if only to ensure that Japan is not so "clearly unsatisfactory" a forum as to warrant denial of *forum non conveniens* dismissal. *Piper*, 454 U.S. at 254-5.

B. Adequacy of Japan As Alternative Forum

The one other potential roadblock arises where the alternative forum does not permit litigation of the subject matter of the dispute, such that "the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all." *Piper*, 454 U.S. at 254 n.22. This is a high standard, and unfavorable differences in law or procedure are not enough to meet it. *See, e.g., Lockman*, 930 F.2d at 768. In the Ninth Circuit, this standard has only rarely been met. *See Ceramic Corp. of America v. Inka*

Maritime Corp., 1 F.3d 947, 949 (9th Cir. 1993) ("rare instance" where forum selection clause in contract effectively forbidding litigation in Japan warranted denial of motion).

Plaintiffs attack the availability of an adequate remedy in Japan on several levels.[6] They have submitted two declarations from a Japanese attorney, Kiyoshi Kawashima, suggesting, based on his interpretation of the Warsaw Convention language, that the Japanese courts would interpret the two year deadline for filing a Warsaw Convention claim (Article 29(1)) as a statute of repose, *i.e.* that the right to sue extinguishes, and cannot be tolled beyond two years after the predicate injury.[7] Kawashima Decl., 3-5. Given that the two-year anniversary of Flight 826 occurred on December 29, 1999, plaintiffs argue it is now temporally impossible to refile

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[6] In so doing, they face a high burden. The Ninth Circuit in *Lockman* catalogued cases in which the basic institutional soundness of Japan's legal system was confirmed, and found that no court of appeals had reached a different conclusion. 930 F.2d at 769 n.3.

[7] The English translation of the official (French) text of the Convention differs from, but is consistent with, Kawashima's interpretation of the text in Japanese. "The right to damages shall be extinguished if an action is not filed within two years . . ." Warsaw Conv., Art. 29(1). Despite this language, American courts have interpreted this language as equivalent to a statute of limitations, allowing for tolling and waiver. *Flanagan v, McDonnell Douglas*, 428 F. Supp. 770 (C.D. Cal. 1977); *Joseph v. Syrian Arab Airlines*, 88 F.R.D. 530 (S.D.N.Y. 1980). This of course has no ultimate relevance to the question presented here, because the interpretation of Article 29(1) is a matter of local law.

in Japan.[8] Second, Kawashima characterizes the Japanese legal system as intolerably slow, giving the example of a personal injury suit arising out of the KAL 007 disaster in 1983, which took fully 12 years to reach judgment. The declarant estimates a trial of the complexity entailed here will entail a similar time frame. Third, Kawashima asserts that hiring attorneys on contingency is not possible in the Japanese legal system, and that the court system imposes high costs of entry to plaintiffs that would keep them out of court in Japan. Fourth, Kawashima cites to enumerated disadvantages of Japanese discovery as a further reason Japan is an inadequate forum for this dispute. Kawashima Decl., 14-16.

a. Article 29(1): Statute of Limitation or Statute of Repose?

For its part, United disputes the accuracy of the statute of limitations/statute of repose conclusion, and the relevance of the other assertions plaintiffs make. United rebuts Kawashima's conclusion that the Warsaw Convention's Japanese translation is a statute of repose in Japan with the declaration of its competing expert Kenichiro Hayashida, who provides the text of a Japanese aviation law treatise reading

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[8] Similarly, plaintiffs contended even several weeks before the two-year anniversary had run that filing of a Japanese complaint before December 29, 1999 was impracticable, due to the evidentiary stringencies of Japanese civil procedures. For his part, United's expert Hayashida contends this is a false problem, because nothing in Japanese procedural law prevents a plaintiff from maintaining concurrent actions here and in Japan. Hayashida Decl., 2. Counsel for United reiterated this point at oral argument.

the two-year statute as one of limitation, capable of tolling and waiver, and not of repose. Hayashida Decl., C.

The parties agree that the interpretation of Article 29(1) is a matter of first impression under Japanese law. Each present a declarant attorney, and scholarly support, for a predicted outcome were a Japanese court to confront the question. With the issue joined, the Court is presented with two options: (1) accept Kawashima's best guess as to what a Japanese court would do, and deny United's motion based on that guess; or (2) rely on Hayashida's interpretation dismiss the action and allow a Japanese court will do if confronted with the task of interpreting Article 29(1). Of the two, Hayashida's opinion is the more persuasive analysis to the Court in assessing how a Japanese court might resolve the issue of law presented. Moreover, from a pragmatic sense, this result is the only means to avoid deciding, either explicitly or by inference, a novel question of Japanese law in this Court, which the Court is ill-equipped and ill-advised to do. Thus, as the Court ultimately concludes *infra* that dismissal is warranted on this record, dismissal contingent upon the ultimate correctness of United's reading of Article 29(1) as a statute of limitations, waivable and subject to tolling, is the appropriate course.

b. Procedural Disadvantages of Japanese Litigation

On the discovery question, plaintiffs have pointed to no specific inadequacy in the discovery process that would render effective litigation impossible. Unfavorable disparities do not rise to the appropriate legal standard, which speaks to the very possibility of obtaining relief in the foreign forum.

Moreover, United's expert attests that recent changes in Japanese civil procedure have cured some of the deficiencies complained of. Hayashida Decl., H.

As for the filing fees in Japanese courts (calculated as a percentage of the damages sought), these have not been found to constitute a barrier to the possibility of suit in the alternative forum. *Cheng v. Boeing,* 708 F.2d 1406, 1410 (9th Cir. 1987). There is no basis for diverging from *Cheng* here.

c. Attorney Fee Arrangements in Japan

As for the fee structure under which Japanese attorneys apparently operate, these raise potentially substantial difficulties for Japanese litigants. However, a majority of courts have concluded that these types of financial concerns should not be given weight in this context. *See, e.g., Magnin v. Teledyne,* 91 F.3d 1424, 1430 (11th Cir. 1996). Given that contingency fee arrangements are uncommon outside the U. S., other courts have noted that giving their absence too much weight would risk eviscerating the doctrine entirely in contingency cases. *Murray v. BBC,* 81 F.3d 287, 292 (2d Cir. 1996); *Coakes v. Arabian American Oil Co.*, 831 F.2d 572, 575 (5th Cir. 1987). In any event, Hayashida's declaration states that Japanese attorneys are amenable to alternative fee structures in cases where plaintiffs have financial hardship. Hayashida also contends that Japanese court can grant legal aid to plaintiffs, and have done so in prior air disaster cases. Hayashida Decl., I.3. Moreover, some of the plaintiffs in this action apparently already have Japanese counsel. *Id.*, I.4. Thus, the Court does not find the

retention of counsel in Japan, even if more problematic, to constitute a bar to the accessibility of that forum.

d. Alleged Slow Justice In Japan

While other courts have found extreme cases of delay to undermine the actual possibility of relief in the alternate forum, *see Bhatnagar v. Surrendar Overseas Ltd.*, 52 F.3d 1220, 1227-28 (3d Cir. 1995) (denial of dismissal proper where India had 25-year backlog on civil docket), no such delay appears on this record. United's expert opines that the litigation in this case would be much less complicated than the KAL 007 litigation. Hayashida Decl., G. Furthermore, he has submitted a newspaper article indicating that the average lifespan of a case in a Japanese court of first instance is 10 months. *Id.*, G. 1-2.

e. Conclusion

The Court finds more persuasive the reasoning of United's expert Hayashida as to the availability of Japan as a forum. The only close issue presented on this record is the interpretation of Article 29(1) of the Warsaw Convention under Japanese law. The American substantive law of *forum non conveniens* strongly suggests a course of action where, as here, an unsettled issue of foreign law is the sole obstacle to a finding of an adequate alternate forum: rather than operate on an American court's best guess as to what a Japanese court might conclude on this issue, the Court and the parties can

defer to a Japanese court to decide the question.[9] This is, in the interests of comity, the most preferable outcome.

Moreover, the ability of this Court to dismiss conditionally means that plaintiffs do not thereby risk the prospect of being kicked out of Court entirely as a matter of Article 29(1) interpretation under Japanese law. If Hayashida's interpretation of the law, and the Court's reliance thereon, were ultimately deemed by a Japanese court to be in error, these cases may be reopened for further proceedings. Conditional dismissal thus allows the legal question to be decided on its merits, with a minimum of what would amount to procedurally dispositive guesswork on this Court's part. *See In re Air Crash Off Long Island, N.Y., on July 17, 1996,* 65 F. Supp. 2d at 215 (*citing Schertenleib v. Traum,* 589 F.2d 1156, 1163 (2d. Cir. 1978)).

Having found Japan to be an adequate alternate forum, the Court must thus go on to evaluate the relative conveniences of the two *fora* under the *Gulf Oil* factors.

D. *Gulf Oil* Private Interest Factors

Gulf Oil identifies at least five private factors for a court to weigh in determining the applicability of *forum non*

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[9] Ultimately, the Japanese court may not reach the question. Article 29(1) is not specific as to forum; it is therefore possible that a Japanese court will regard plaintiffs' timely filing of Warsaw Convention claims in an American court as effectively mooting the issue. That determination will depend on Japanese law, as provided by Article 29(2). This possibility further weighs in favor of allowing the Japanese courts to determine their domestic law.

conveniens. "Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained." *Gulf Oil*, 330 U.S. at 508.

The parties have not briefed these factors in a line-item fashion. Of these factors, the parties focus primarily on the location of sources of proof. United claims that these are damages cases at this point, indicating that all sources of documentary evidence on this point – doctors' reports, witnesses as to diminished quality of life, and the like – reside in Japan. United also draws the Court's attention to apparent resistance by plaintiffs to providing deposition testimony in the U.S.; plaintiffs dispute this point.

Furthermore, as *Piper* demonstrates, dismissal for *forum non conveniens* may be proper even where crucial evidence is located in the U.S., where the totality of considerations mandated by *Gulf Oil* so provides. Plaintiffs counter, against their larger interest, that United's predicate liability is still very much at issue in these cases, and that the majority of the liability witnesses and documents are here in the U.S. Plaintiffs point out that, in other lawsuits filed by Japanese passengers of Flight 826 in the Japanese courts, United has disputed liability, arguing that the contributory negligence of passengers relieved it from liability under the Warsaw Convention. Steinle Decl., Exhs. A, B. However, even assuming this to be true it is unclear who or what in the

U.S. would give insight into the carrier's predicate liability. Plaintiffs' counsel was unable to shed light on this at oral argument, besides alleging that the Flight 826 flight crew might have percipient testimony regarding passengers' use of seat belts. The problem with that assertion, made for the first time at argument, is that the Court has not been provided with any idea of where this flight crew is based – *ie.*, it may well be Japan. Other major potential sources of evidence reside in Japan. Of those potential sources residing in the U.S., some are not available as evidence in any event: as United points out, the NTSB report of this incident cannot be introduced at trial as a matter of federal statutory law. 49 U.S.C. § 1154(b).

As the incident occurred in airspace over the Pacific, and at no time involved an event on American territory, even liability questions (such as contributory negligence, or the scope of the "accident" for Convention purposes) would seem not to warrant use of this forum. If anything, expert testimony might be sought from the U.S., and the convenience of experts – like the convenience of lawyers – is a factor accorded little to no weight under *Gulf Oil*.

Thus, plaintiffs have not given the Court any particularized basis for finding either (1) that there is a predicate liability case to be shown which would outweigh damages proof, and (2) that the method of proving that case is predominantly in the U.S.[10]

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[10] The fact that Flight 826 took off from, and six hours later made an emergency landing at, Tokyo's Narita Airport undermines as a matter of common sense plaintiffs' assertion that unspecified documents and witnesses are stateside. For example, the

The other major issue joined by the briefs on private interest factors is the language gap. Specifically, the lion's share of plaintiffs' documentary and testimonial case-in-chief is in Japanese. Exhibit C of the Grotch Declarations provide the Rule 26 disclosures of each witness, and virtually all of the documentation therein is in Japanese. This presents significant questions of trial presentation, especially with a multiplicity of plaintiffs, each with individual injuries, individual treating physicians, and family members each testifying – ostensibly in Japanese – regarding each plaintiff's damages. This language gap has been important to several courts in granting *forum non conveniens* dismissal. *Magnin v. Teledyne,* 91 F.3d 1424, 1429-30 (11th Cir. 1996) (predominance of French-language witnesses weighed in favor of dismissal); *Lu v. Air China* (predominance of Chinese witnesses and Chinese-language documents). Trial presentation, in the damages phase, thus will be lengthy and particularized, and burdensome on a court and jury. On the other factors, transportation of willing witnesses would be costly, but exclusively for plaintiffs, which renders the burden on defendant somewhat more tolerable. Any unwilling witnesses, however, would escape the reach of this Court. Overall, the balance of private interest factors central to the Court's inquiry under *Gulf Oil* and *Piper,* the latter

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complaints' allegation that flight navigation should have revealed the likelihood of severe turbulence would seem to implicate flight plans, weather reports, and the like originating in Tokyo. Similarly, United's role, if any, in the allegedly negligent provision of emergency services at Tokyo does not impact this forum. Thus, even accepting plaintiffs' premise that a liability case remains, it is unclear what the connection to this forum would be.

requiring consideration of the logistical burden on this Court, clearly weigh in favor of Japan as the forum for this suit.

E. *Gulf Oil* Public Interest Factors

Gulf Oil provides the following recitation of the public factors impacting a court's *forum non conveniens* analysis. "Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only....There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in laws foreign to itself." 330 U.S. at 509.

On public factors, United focuses generally on the congested dockets of this Court, the attenuated connection of this jury venire to the well-being of Japanese citizens, and the possible entanglements with Japanese law. Plaintiffs counter that international air travel is a topic of general public concern, and that United's dominant presence in the West Coast market provides a substantial impact on the public interest. Neither side moves much beyond the generic on these factors, although the attenuated nexus to this forum weighs against burdening a jury, particularly where, as here, the trial promises to be lengthy and at least linguistically

problematic. *See Pain v. United Technology Corp.*, 637 F.2d 775, 792 (D.C. Cir. 1980).

The last issue is the choice of law, and potential conflicts of law to be considered by this Court in resolving the matter. The United tariff that the substantive law of the passenger's permanent residence governs damages. Grotch Decl., Exh. D. Thus, Japanese law will govern all of plaintiffs' claims, whether here or in Japan. In sum, on the public factors, United has not made a particularly strong showing, although the strength of showing on the *Gulf Oil* private interest factors overshadow (and in several ways, including the logistical nightmare that an American jury trial of some length conducted substantially in Japanese would present, spill over into) this element.

F. Conditional Dismissal

Courts have frequently predicated the grant of a *forum non conveniens* motion on the defendants' representations regarding jurisdiction, amenability to process, enforceability of judgment, and waiver of defenses that would have arisen directly from the delay in filing suit in the wrong forum initially. *Contact Lumber*, 918 F.2d at 1450; *Cheng v. Boeing Corp.*, 708 F.2d 1406, 1409 (9th Cir. 1983); *Ionescu*, 465 F. Supp. 139, 147-8 (S.D.N.Y. 1979). United has indicated its willingness to receive process in Japan, not to contest personal jurisdiction, and to waive any defense arising from the time gap between filing here and filing in Japan. Mot. at 1. As United itself indicates, these concessions are commonly made by defendants in seeking *forum non conveniens* dismissal.

Thus, the Court explicitly conditions its dismissal upon the following conditions: (1) that United consent to jurisdiction in Japan; (2) that United waive any statute of limitations defense arising from the time interval from the filing of any individual suit in this court to a filing of the parallel suit in Japan; (3) that United take no legal position inconsistent with the position taken in this Court that Article 29(1) is a statute of limitation; (4) that the Japanese courts actually assume subject matter jurisdiction over the actions refiled in Japanese courts; and (5) that United agree to satisfy any judgment against it by a Japanese court. As to the first, second, third and fifth points, United shall file and serve a written undertaking within twenty (20) days of the date of this order indicating its agreement to these terms as conditions of dismissal. On the fourth point, the parties shall apprise the Court of any relevant developments in the Japanese courts.

CONCLUSION

There are convenience factors strongly weighing in favor of dismissal for the purpose of litigating these cases in Japan. Plaintiffs' rebuttal that the bulk of liability witnesses and documents are located in the United States is unsupported by a showing that would permit the Court to agree with this claim. Furthermore, trial of damage issues in this Court would be severely burdensome and inconvenient. The interpretation of Article 29(1) of the Warsaw Convention under Japanese law is novel, but this does not constitute a bar to dismissal. In conditionally dismissing this action, the Court has undertaken the most pragmatic approach appropriate under the law of this forum

to ensure that the parties achieve substantial justice without undue burden to any party or legal system.

United's motions to dismiss for *forum non conveniens* are GRANTED.[11]

IT IS SO ORDERED.

Dated: 1/7/2000 /S/_____
MARTIN J. JENKINS
UNITED STATES
DISTRICT JUDGE

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[11] The Court recognizes that not all of the Flight 826 cases currently pending in this Court were noticed for these motions, as new suits related to the same predicate events have been filed during the pendency of this motion. The Court encourages the parties to cooperate by stipulating to dismiss all like actions pending before this Court as if explicitly noticed in these motions, and for United to include those cases and plaintiffs in its undertaking regarding defenses and satisfaction of judgment in Japan.